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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.

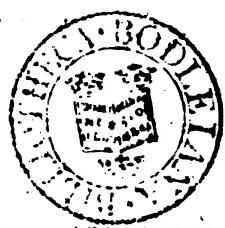
WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY
RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
EDWARD HALL ALDERSON, OF THE INNER TEMPLE, ESQRS.,
BARRISTERS AT LAW.

V O L . V.

Containing the Cases of MICHAELMAS, HILARY, EASTER, and
TRINITY Terms, in the 2d and 3d of GEO. IV. 1821, 1822.

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1822.



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J U D G E S
OF THE
COURT OF KING's BENCH,

During the Period of these REPORTS.

Sir CHARLES ABBOTT, Knt. C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir WILLIAM DRAPER BEST, Knt.

ATTORNEY-GENERAL.

Sir ROBERT GIFFORD.

SOLICITOR-GENERAL.

Sir JOHN SINGLETON COPLEY.



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ERRATA.

- Page 3. n. (c) for "10 East, 830," read "10 East, 130."
 55. l. 14. "not entitled to recover," dele "not."
 167. l. 14. for "obligee," read "obligor."
 198. n. (a) l. 4. for "indorsement or certificate," read "on the certificate."
 261. marginal note, l. 8. for "obligee," read "obligor."
 373. n. (c) for "443." read "473."
 444. marginal note, l. 29. for "13 Geo. 3." read "17 Geo. 3."
 460. l. 1. for "19," read "15."
 538. marginal note, l. 12. for "28 Geo. 2." read "22 Geo. 2."
 561. l. 5. for "by," read "to," and same in marginal note line 8., and note, that
Golding Ray was a trustee, and see 5 *Med. 310.* same case.
 565. n. (c) for "656." read "652."
 627. n. (a) for 1 *Town.* read "6 *Town.*"
 633. n. (a) for "6 *Town.* 423" read "6 *Town.* 433."
 654. l. 12. for "against the defendant," read "against the plaintiff."
 687. marginal note, l. 7. dele "not."
 712. ____ l. 12. for "obligor," read "obligee."
 ____ l. 24. for "obligee," read "obligor."
 ____ l. 28. for "obligee," read "obligor."
 793. n. (a) for "1 *Solv.* 29." read "1 *Solv.* 294."

C A S E S

ARGUED AND DETERMINED

1821.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Second Year of the Reign of GEORGE IV.

VERNON *against* SMITH.

Saturday, (a)
October 20th.

COVENANT by the assignee of the lessor against the lessee. The declaration stated, that one *J. Hance*, the lessor, before the time of making the lease, was lawfully possessed of the tenements and premises for the residue and remainder of a certain term of years, whereof seven years were then unexpired; which tenements and premises, with the appurtenances, then were and thence hitherto have been and still are situate within the weekly bills of mortality, mentioned in the 14 G. 3. c. 78.; and being so possessed thereof, he, the said *J. Hance*, by indenture, demised and leased to the defendant the tene-

A covenant to insure against fire premises situated within the weekly bills of mortality mentioned in 14 G. 3. c. 78., is a covenant that runs with the land.

(a) See 4 B. & A. 345.

VOL. V.

B

ments

1821.

VERNON
against
SMITH.

ments and premises, with the appurtenances, habendum, for seven years, at a certain rent therein mentioned ; covenant by the defendant that he should and would forthwith, at his own expence, and from time to time during the term, insure in some of the public offices in *London or Westminster*, for the purpose of insuring houses from casualties by fire, the messuage, dwelling-house, coach-house, stable, and premises thereby demised or thereafter to be erected and built thereon, to the amount of 800*l.*, in the joint names of the defendant, his executors, administrators, or assigns, and of *Robert Stone*, the ground landlord of the premises, his heirs or assigns; and should and would, at the request of *Hance*, or of the ground landlord, their heirs or assigns, produce the policy and receipts for such insurance. The declaration set out the proviso in the lease for re-entry, on breach of any of the covenants. It then stated the Defendant's entry into the premises, and that, after the making of the indenture, the term was assigned by *Hance* to the plaintiff. The breach assigned was, that the defendant did not insure. The second count stated, that, before the making of the demise to the defendant, in the first count mentioned, and also before and at the time of the making of the demise thereafter mentioned, *Robert Stone* was seised in fee of and in the said demised tenements, and by a certain indenture, demised the same to *J. Hance*, habendum, for 85 years and six months. And that *J. Hance*, by that indenture, covenanted to insure the premises from fire, to the amount of three-fourths of the value therof, in the joint names of himself and *Stone*, with a proviso for re-entry, in case of non-performance of the covenants. It then stated, that three-fourths of the value of the pre-
mises

mises amounted to 800*l.*, and that, by reason of the said demised premises remaining uninsured, *Stone* brought an action of ejectment for the forfeiture, and the plaintiff was forced to pay the costs to him, amounting to 500*l.*, and also to sustain his own costs, amounting to 1000*l.* Breach, that the defendant had not kept the covenant made by him, as stated in the first count. To this declaration, there was a general demurrer and joinder.

1821.

VERNON
against
SMITH.

Comyn, in support of the demurrer. The assignee of the lessor cannot maintain this action, because the covenant to insure against casualties by fire is a mere personal covenant. Covenants which run with the land must be such as affect the land itself, and not the collateral interest of the lessor. The rule upon this subject is accurately laid down in *Spencer's case* (a), *Bally v. Wells* (b), and *The Mayor of Congleton v. Pattison*. (c) In *Spencer's case* it is expressly stated, that a covenant to pay a collateral sum to the lessor or a stranger, shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing demised. By the covenant to insure, the lessee agrees to pay an annual sum to a stranger, in consideration of which that stranger is to pay to the lessee a certain stipulated sum, in case the premises should be injured by fire. There is not any stipulation that that sum, when recovered, shall be laid out upon the land, and the tenant may therefore apply it to any other purpose. The covenant does not, therefore, in any respect affect the nature, quality, or value of the thing demised, independently of collateral circumstances, and therefore is not a covenant which passes to the assignee. Secondly,

(a) 5 *Colv.*, 17. (b) *Wilmot's Notes*, 344. (c) 10 *East*, 330.

CASES IN MICHAELMAS TERM

1821.

*Vernon
against
Smith.*

the nature of the covenant cannot be altered by the provisions of the 14 Geo. 3. c. 78. s. 83., which apply only to the case where an insurance has actually been made, and does not go to regulate the covenants between lessor and lessee. No insurance having been made in this case, it does not fall within the statute. Thirdly, the statute only enables the directors of the company, upon the request of the persons interested in the houses damaged by fire, or upon any ground of suspicion that the persons insured had been guilty of fraud, or of wilfully setting their houses on fire, to cause the insurance money to be expended in rebuilding the premises. Now as it appears, from the preamble of the clause, that the object was to prevent fraudulent insurances, the power of the directors so to apply the money ought to be restrained to such cases only. Nor does it apply to a case where the money has been disposed of among the contending parties previously to the application of the parties interested. The statute, therefore, is not absolutely directory that the money recovered shall at all events be laid out on the premises, and, consequently, it does not alter the situation of the defendant in this case.

Chitty, contrà. The lessee having covenanted to cause the insurance to be effected in the joint names of the ground landlord and himself, could not, in the event of his having effected such an insurance, and a loss having afterwards occurred, have received the money without the consent of such landlord, and a court of equity would have directed the money to be laid out in rebuilding or repairing the premises. The interest of the landlord is materially varied by the circumstance of the lessee

lessee being bound to insure: for the rent reserved is decreased, in proportion to the amount of the annual premium paid, and the assignee of the lessor would take the premises at an increased rent, unless the lessee had covenanted to insure. The covenant, therefore, to insure affects the nature, quality, or value of the thing demised, and, therefore, is a covenant which runs with the land, and it is quite clear, that, by the provisions of the 14 G. 3. c. 78. s. 83., the covenant to insure, in the present case, becomes, by operation of law, a covenant to lay out the money recovered in rebuilding the premises, at the request of the lessor; for the enacting part of the clause does not confine the power of the directors to lay out the money to cases of fraud, but is in the alternative, and enables them so to do in any case, upon the request of the party interested. Coupling, therefore, the covenant with the statute, it is, in effect, a covenant to lay out the money recovered in rebuilding the premises, in case the lessor requires it; and that being so, it is clearly a covenant which respects the thing demised, and therefore passes to the assignee.

1821.

 VERNON
against
SMITH.

ABBOTT C. J. It is not necessary, on the present occasion, to give any opinion on the effect of a covenant to insure premises situate without the limits mentioned in the 14 Geo. 3. c. 78. These premises lying within those limits, the effect of that statute is, to enable the landlord, by application to the governors or directors of the insurance office, to have the sum insured laid out in rebuilding the premises. Now a covenant to lay out a given sum of money in rebuilding or repairing the premises, in case of damage by fire, would clearly be a covenant running with the land, that is, such a covenant

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1891.

Year
against
Sect.

as would be binding on the assignee of the lessee, and which the assignee of the lessor might enforce. Here the defendant does not covenant expressly in those words, but only that he will provide the means of having £300 ready to be laid out in rebuilding the premises in case of fire. But, connecting that covenant with the act of parliament, the landlord has a right to say, that the money, when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in rebuilding, and as beneficial for the landlord as if the tenant had expressly covenanted that he would lay out the money he received in respect of the policy upon the premises. For these reasons, I think that this is a covenant running with the land, for the breach of which the assignee of the lessor may sue; and, consequently, there must be judgment for the plaintiff.

BAYLEY J. I am clearly of opinion, that the assignee of the reversion is entitled to sue upon the covenant in question. The rule is, that if the covenant respect the thing demised, and be co-extensive with the estate of the person to whom it is made, and be made with him and his assigns, it passes to his assignee. The only question in this case is, does this covenant respect the thing demised? It is a covenant to insure the premises against damage by fire. By the operation of the 14 Geo. 3. c. 78. s. 83., the effect of that insurance is not merely to put into the pocket of the person effecting it, in case of loss, the amount of the money insured, but to entitle the owner of the estate to have that money laid out on the land; and if such be the effect of the covenant, it does affect the thing demised, as much as a covenant to repair or rebuild, in case of damage by fire.

I think,

I think, therefore, that there must be judgment for the plaintiff.

1821.

 V.
against
Surrey

HOLBOYD J. I am of the same opinion. If the covenant to insure to the amount of 800*l.*, in case of fire, could be considered as a covenant to pay a collateral sum to the lessor, the present action could not be supported; but, taking that covenant, together with the stat. 14 G. 3. c. 78. & 83., I think that the sum insured is not to be considered as a collateral sum, but as a sum which, by operation of law, must be laid out upon the premises. It is, therefore, a covenant to do a matter which concerns the land, and falls within the rule laid down in *Spencer's* case, and by Lord Chief Justice *Wilmer* in *Bally v. Wells*. He there lays it down thus: "Covenants in leases, extending to a thing 'in esse,' parcel of the demise, run with the land, and bind the assignee, though he be not named, as to repair, &c. And if they relate to a thing not 'in esse,' but yet the thing to be done is upon the land demised, as to build a new house or wall, the assignees, if named, are bound by the covenants; but if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound by such covenants; or if the lease is of sheep or other personal goods, the assignee, though named, is not bound by any covenant concerning them. The reasons why the assignees, though named, are not bound in the two last cases, are not the same. In the first case, it is because the thing covenanted to be done has not the least reference to the thing demised; it is a substantive, independent agreement, not 'quodam modo,' but 'nullo modo,' annexed

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1821.

VERNON
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or appurtenant to the thing leased. In the case of the mere personality, the covenant doth concern and touch the thing demised; for it is to restore it or the value at the end of the term; but it doth not bind the assignee, because there is no privity, as there is in the case of a realty between the lessor and lessee and his assigns, in respect of the reversion; it is merely collateral in one case; in the other it is not collateral, but they are total strangers to one another, without any line or thread to unite and tie them together; and to constitute that privity which must subsist between debtor and creditor to support an action." And in page 346., after citing several cases, from which he deduces the principle laid down, he says, "All these cases clearly prove, that 'inherent' covenants, and such as tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease, let them go where they will." In the present covenant, assigns are expressly included; and, inasmuch as the performance of the covenant would, in the event of the premises being destroyed or injured by fire, tend to the support and maintenance of the thing demised, I am of opinion, that it falls within the rule laid down by Lord C. J. *Wilmet*, and, consequently, that there must be judgment for the plaintiff.

BEST J. It has been argued, from the preamble to the 83d section of the 14 G. 3. c. 78., that this provision of the statute only applies to cases where fraud is suspected. But the enacting part of the clause goes beyond the mischief mentioned in the preamble, and is large enough to embrace this case. For, under the first branch of it, where the owner of the building requests

quests the insurance company so to apply the money, no suspicion of fraud is necessary to make such request compulsory on the directors. Within the district, therefore, to which the building act applies, this covenant provides a fund for the rebuilding of the premises, which the owner has a right to require shall be applied to that purpose; and then it is clear, that the assignee has a direct interest in having the insurance kept up. But I think, also, that if the premises were in any other part of the kingdom, this would be a covenant that would pass to an assignee. A covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned. If this were not the law, the tenant would hold the estate discharged from the performance of one of the conditions on which it was granted to him. The original covenantee could not avail himself of this covenant; he sustains no loss by the destruction of the buildings, and therefore has no interest to have them insured. In *The Sadler's Company v. Badcock* (a), Lord Hardwick says, that Lord Chancellor King, in the case of *Lynch v. Dayrell*, held, that a person who had assigned his interest in a house before the fire happened which consumed it, had no right to the money under the policy. I cannot say whether a court of equity would take any steps to secure the application of the money insured for the benefit of the estate. I presume, that if a court of equity would assist a covenantee to have the money, recovered under the policy by his tenant, expended on the estate, it would render the same assistance to an assignee.

1821.

VERNON
against
SMITH.

(a) 2 Alkys, 577.

1821.

Venues
against
Savile.

If a court of equity will not interfere, either for the one or the other, still this covenant is as beneficial to an assignee as it was to the covenantee. It secures to the tenant the means of performing his covenant, and to the landlord, a solvent instead of a ruined tenant. It is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate; and therefore may be said to be *beneficial to the estate*, and so directly within the principle on which covenants are made to run with the land. At the time that the 32 Hen. 8. c. 34. was passed, an immense quantity of land passed from the dissolved monasteries to the king, and from the king to the most favoured and powerful of his subjects. Much of this land was on lease, and both the king and his parliament must have been anxious that the assignees of the reversion should be in as good a situation as the lessors were. This statute expressly enacts, "that grantees of estates shall have and enjoy the like advantages against lessees, their executors, &c., by entry for non-payment of rent, or for doing of waste or other forfeiture, and the same benefit and remedy by action for not performing of other conditions, covenants, or agreements, as the lessors or grantors themselves might have had." Lord Coke (*Co. Litt. 215. b.*) limits the operation of these general words, to "such conditions as are incident to the reversion as rent, or for the benefit of the estate." He adds that the statute does not extend to "covenants for payment of a sum in gross, delivery of corn, wood, or the like." A sum in gross is in the nature of a fine which belongs to the lessor, and can never be intended for an assignee. By the deliveries of corn and wood were meant deliveries of those articles at the mansion-house of the lessor, and not rents

rents payable in corn or wood, without any stipulation as to the place where the articles were to be delivered. These deliveries at the mansion-house were inconsiderable in value, and would be of no use to the assignee, unless he became the assignee of the mansion as well as the farm. In *5 Coke, 18.* it is said, "that the 82 H. 8. was resolved to extend to covenants which touch or concern the thing demised, and not to collateral covenants." In *Spencer's case, Moore, 159.*, the same doctrine is laid down in the same terms, and this case is put by *Gandy J.*, and assented to by all the Judges and serjeants, "that a covenant that a lessor will, at the end of the term, grant another lease runs with the land. The covenant here mentioned is not beneficial to the estate granted, in the strict sense of the words, because it has no effect until that estate is at an end, but it is beneficial to the owner, as *owner*, and to no other person. By the terms *collateral covenants*, which do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate. This principle will reconcile all the cases. In *Webb v. Russell (a)*, Lord *Kenyon* considers grantees or assignees to stand in the same situation, and to have the same remedy against the lessees, as heirs at law of individuals, or successors in the case of corporations, had before the statute. For these reasons, I am of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

(a) *3 Term Rep. 402.*

1821.

VERNON
against
SMITH.

1821.

*Monday,
October 22d.*WESTCOTT *against* HODGES.

A., B., and C. entered into a bond to the king, the condition of which was, that A., as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage coaches. A., as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. A sci. fa. having afterwards issued upon the bond, B., one of the sureties, paid a sum of mo-

THE declaration, after stating the appointment of the defendant to be a subdistributor of stamps, alleged that, "in consideration that the plaintiff, at the request of the defendant, would execute a certain writing obligatory to his majesty, in the sum of 500*l.*, as a security for the defendant, and with a condition, that the defendant should account for all vellum, parchment, &c. he, defendant, promised to save and keep plaintiff harmless and indemnified from all damages, costs, &c. that he should sustain in consequence of the plaintiff's executing the writing obligatory, or by reason of the defendant's breach of the condition thereof." Averment, that the plaintiff executed the bond, that defendant having broken the condition, and the bond having thereby become forfeited to the king, a scire facias issued against the plaintiff and defendant, and one *C. F.*, and that such proceedings were thereupon had, that the plaintiff, to avoid paying the 500*l.* due on the bond, was forced to pay 50*l.* to compromise the suit, and also 61*l. 1s. 9d.* for his costs, charges, and expences. Plea, that, before the commencement of this suit, defendant became bankrupt, and that the cause of action accrued *before* his bankruptcy.

The cause was tried before *Graham Baron* at the *Hants Summer assizes*, 1819, when a verdict was found for the plaintiff to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that *A.* was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 3. c. 121. s. 8.; and, consequently, that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded.

for

for the plaintiff, subject to the opinion of the Court on the following case.

The defendant having been appointed subdistributor of stamps for the town of *Ringwood*, in the county of *Southampton*, he, together with the plaintiff and one *Finch* as his sureties, on the 6th *February*, 1812, entered into a joint and several bond for 500*l.* to his majesty, the condition of which was, that if the defendant should well and truly account for all vellum, &c. duly stamped, which he should receive from the commissioners or head distributor of stamps, and for all sums of money which he should receive on account of the duties on personal legacies and stage coaches, and should pay to such commissioners or head distributor the duties payable for such stamped vellum, &c.; and also the price of such vellum, &c., and the duties received by him in respect of personal legacies and stage coaches, then the obligation to be void. In *December*, 1813, the defendant duly rendered to the head distributor of stamps, an account of the money due from him as subdistributor, by which he made himself debtor for 301*l.* In *March*, 1814, he was declared a bankrupt, and the plaintiff and one *Corbin* were appointed assignees, but no dividend has yet been made. He obtained his certificate on the 23rd of *May*, 1814. In *June*, 1815, a scire facias issued against all the parties to the bond at the suit of the king, and the plaintiff, on the 15th *November*, 1817, paid the sum of 50*l.* to compromise that suit. The costs of defending the suit amounted to 61*l.* 1*s.* 9*d.* For these sums the present action was brought.

E. Lawes for the plaintiff, made two points, first, that the statute of the 49 G. 3. c. 121. s. 8. must be specially pleaded, and could not be given in evidence under the

general

1821.

—
WESTCOTT
against
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1821.

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general plea of bankruptcy, given by stat. 5 G. 2. c. 30. s. 7. *Stedman v. Martinant.* (a) And although in that case the immediate point in judgment was, whether defence given by the 49 G. 3. was available under the general issue, yet it appears, by a subsequent report of the case (b), that the defendant, in consequence of the decision of the Court upon the point of pleading, afterwards pleaded a special plea of bankruptcy. It was quite incongruous for the defendant to plead, that the cause of action accrued *before* the bankruptcy, when he meant to rely on a particular statute, applicable only to the case of its having accrued *after* the bankruptcy. And such form of pleading would mislead the plaintiff, instead of giving him any idea of the true nature of the defence. The words of the statute are, that the bankrupt should be discharged of all demands in *like* manner, to all intents and purposes, as if the surety had been a creditor before the bankruptcy; but it does not give any precise form of plea, much less does it require the same form of plea as is given by the stat. 5 G. 2. c. 30. s. 7. Secondly, the bond is, in its nature, wholly incapable of valuation; and therefore not proveable under the commission, *The Overseers of St. Martin v. Warren.* (c) It is a bond for the performance of several things, the non-performance of which would only entitle the plaintiff to unliquidated damages, and it cannot be treated as a divisible bond, so as to allow it to be proved under the commission for damages arising by the breach of one part of the condition, leaving the bond still in force as to the residue, *Taylor v. Young.* (d)

(a) 12 East, 664.

(c) 1 Barn. & Ald. 495.

(b) 13 East, 427.

(d) 5 Barn. & Ald. 595.

The

The statute 49 G. 3. c. 121. s 8. was not meant to discharge the bankrupt from any demand, in respect of payment made after the commission, where he would not have been discharged from it by the statute 5 G. 2. c. 30. if payment had been made before the bankruptcy. But this case is not within that statute; first, because the plaintiff was not surety for any debt; secondly, he had not paid the whole debt, or any part thereof, in discharge of the whole. If there was any debt, it was the penalty of the bond; and even if the damages sought to be recovered by the crown, are considered as the debt, the 50*l.* paid by way of compromise for it, was not a legal discharge of the debt without a release. *Fitch v. Sutton.* (d) Thirdly, the statute did not contemplate the case of a surety in a bond to the king, but to a common creditor only who might, or might not, prove his debt under the commission, and be barred by such proof; whereas there is no instance of the crown proving under a commission of bankrupt, nor is the king barred by any of the statutes of bankruptcy, not being specially named in them.

1821.

Westcott
against
Hobans.

ABBOTT C. J. I am of opinion, that the plea is good both in form and substance, and that this case falls within the 49 G. 3. c. 121. s. 8. The words of that statute are very large. It enacts, "that where, at the time of the issuing of the commission, any person shall be surety for, or liable for any debt of the bankrupt, it shall be lawful for such surety, or person liable, if he shall have paid *the debt*, or any part thereof, in discharge of the whole debt, although he may have paid

(e) 5 East, 230.

the

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1821.

Westcott
against
Honors.

the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to the dividends upon such proof, and when the creditor shall not have proved under the commission, it shall be lawful for such surety or person liable, to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and to receive a dividend proportionably with the other creditors taking the benefit of such commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt, after an act of bankruptcy had been committed by such bankrupt, and every person against whom such commission of bankrupt has been awarded, and who has obtained his certificate, shall be discharged of all demands, &c." In order to bring the case within the statute, it is not necessary that the principal creditors should be enabled to prove, or that the bankrupt should be discharged by his certificate, if he does not; and it seems to me, that this case does not differ from the case of a surety in a bond to a private person. It has been contended, that this is not to be considered as a debt, but we are of opinion, that it may be considered as a debt in the strictest sense of the word. In the first place, the penalty might be sued for as a debt at law. Besides, debts may arise out of the breach of the condition of a bond framed as this is. For a debt is thereby created as much as in the case of a contract for goods sold and delivered, or money had and received. For these reasons, we are all of opinion, that this is a case coming within the section of the statute. Another point has been made upon the form of the pleadings, viz. that the bankruptcy should have been specially pleaded;

pledged. We are, however, of opinion, that the general plea is sufficient in this case. There is no decision to shew, that the plea in the general form will not do. Now the 49 G. 3. c. 121. s. 8. enacts, "that the bankrupt who has, or shall obtain his certificate, shall be discharged at the suit of every such person, having so paid, or being thereby enabled to prove as aforesaid, or to stand in the place of such creditor as aforesaid, with regard to his debt in respect of suretyship or liability, in like manner to all intents and purposes, as if such person had been a creditor before the bankruptcy." Now we think the obvious meaning of this is, that the bankrupt should have the same benefit of a precise form of pleading, as if the debt had arisen before the bankruptcy, and that a payment made by a surety after the bankruptcy, places the party in the same situation as if the payment had been made before the bankruptcy by any other person. We are therefore of opinion, that the plea is good both in substance and form, and consequently that the postea must be delivered to the defendant.

1821.

Westcott
against
Hodges.

Judgment for defendant.

1821.

*Monday,
October 22d.*

DOE Dem. JOHN HURRELL and EDWARD LIVERMORE *against* ROBERT DEVEREUX FANCOURT HURRELL and Others.

A testator having both real and personal estate, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, whatsoever and wheresoever, to trustees, their executors, administrators, and assigns, upon trust; that they should, out of such residue of the monies and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession for the remainder of his term therein, for the joint advantage of certain of his sons and daughters therein named; and, at the expiration of the said term, upon further trust, to sell and dispose of such

residue of his estate and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters: Held, that the testator's real estate did not pass by this will.

EJECTMENT, to recover the possession of certain premises in the county of *Essex*. The cause was tried at the *Essex* Spring assizes, 1820, before *Garrow* B., when the jury found a verdict for the lessors of the plaintiff, subject to the opinion of the Court, on the following case.

On the 21st of *May*, 1805, *Moses Hurrell* the elder, being seized in fee of the freehold premises in question, and being also possessed of personal property, made his last will, duly executed to pass real estates, as follows: I give unto my sons, *John, Aaron, William, Charles, and Thomas*, and to my daughters, *Susanna and Rebecca*, the sum of 100*l.* a-piece, to be paid to such of them as shall be under the age of 21 years at the time of my decease, upon their attaining the respective ages of 21 years; and to such of them as shall have attained their respective ages of 21 years at that time, within six months after my decease; with benefit of survivorship among them, in case of the death of any or either of them under the age of 21 years. And as I have already provided for my son *Moses*, and my daughter *Sarah*, the wife of *Edward Livermore*, I do hereby only give them the sum of 10*l.* a-piece for mourning, to be

paid

paid to them respectively within six months after my decease. And after payment of the above-mentioned legacies, my just debts, funeral, testamentary, and other incidental expences, I give and bequeath all *the rest and residue of my estate and effects whatsoever and where-soever*, unto my brother, *Aaron Hurrell*, my said son *John*, and my said son-in-law, *Edward Livermore*, their executors, administrators, and assigns, upon the following trusts; that is to say, upon trust, that they shall, out of such residue of the monies and effects that I shall die possessed of, carry on, manage, and cultivate the farm now in my possession, for the remainder of my term and interest therein, for the joint advantage of my said sons, *John, Aaron, William, Charles, and Thomas*, and my said daughters, *Susanna and Rebecca*; and at the expiration of the said term, upon further trust, to sell such residue of my estate and effects, or such effects, as shall then be upon my farm, and divide the money arising among his said last-mentioned five children. And I do hereby appoint my brother *Aaron Hurrell*, my said son *John*, and my son-in-law, *Edward Livermore*, executors of this my will."

The testator died in *February 1807*, and on the *25th March, 1808*, the will was duly proved by the executors. The tenant in possession of the estate under the testator, after his death, paid one half-year's rent, due for the premises, at *Lady-day, 1807*, to the lessors of the plaintiff, who are the surviving devisees in the will, and to the said *Aaron Hurrell*, since deceased; after which payments, the said *Robert Devereux Fancourt Hurrell* being the heir of the testator, in that character and right, entered into possession of the estate and pre-

1881.

*Dox dem,
HURRELL
against
HURRELL.*

CASES IN MICHAELMAS TERM

1821. mises, and he, together with the other defendants, hath thence and hitherto retained possession thereof.

**Doe dem.
Hurrell
against
Hurrell.**

Sugden, for the plaintiff. The real estate passed by this will to the trustees. The object of the testator was to provide for all his children, and he gives and bequeaths all the residue of the estate and effects to the trustees, for that purpose. If the will had stopped here, it is quite clear that the real estate would have passed by those words; but it goes on, "In trust, out of such residue of the monies and effects, to manage his farm to the end of his term." It may therefore be said, that the testator only meant to give to them the residue of his monies and effects; but then the trustees, at the expiration of the term, are directed to sell and dispose of the residue of his *estate and effects*, and therefore the testator must have intended more to pass than his monies and effects. Besides, the real estate will pass under these words, provided it appear, from the other part of the will, that he intended it to pass. *Doe, Lessee of Wall v. Langlands* (a), and *Doe, dem. Andrew v. Lainchbury*. (b) Now here, by the use of the words, "residue of his estate and effects," it does appear, that the testator meant the real estate to pass.

H. J. Stephen, contra, was stopped by the Court.

ABBOTT C. J. We are all clearly of opinion, that the testator did not mean that his real estate should pass by this will. We must collect the intention from the whole context of the will. There can be no doubt,

(a) 14 *East*, 370.

(b) 11 *East*, 290.

that

that words, which, in their technical sense, generally denote personal property, will pass the real estate, if such appears from the whole of the will, taken together, to have been the intention of the testator. It is quite clear, that the testator here intended that his personal property only should go to the trustees. The bequest is to them, their executors, administrators, and assigns; the word "heirs" is not used. That circumstance is not indeed very strongly to be relied on; but it is not to be altogether rejected in construing this will. The nature of the trusts clearly shews, that the testator meant to bequeath his personal property only, for the trustees are directed, out of such *residue* of the monies and effects, to manage the farm for the remainder of his term. Now the real estate was not applicable to such a purpose, for the trustees, at all events, had no power to sell any part of the estate bequeathed to them, until the end of the term. Then the testator directs the trustees, at the expiration of his term, to sell such residue of his estate and effects; or such effects as shall be upon his said farm. It appears to us therefore, that, by using the latter word, he himself has furnished a comment upon the words *the residue of his estate and effects*; and that by those words, he meant only such estate and effects as constituted personal property. Inasmuch, therefore, as it was not necessary that the trustees should take the real estate, and as it was not suitable to the purposes of the trust, we are of opinion that the real estate did not pass by the will, and consequently, that there must be judgment for the defendants.

1821.

Dox dem.
HURRELL
against
HURRELL.

Judgment for defendants,

1821.

*Tuesday,
October 22d.*

STEELE against MANNS.

A. having purchased an estate free from rectorial tithe, with a right of common thereto annexed; the common was afterwards inclosed under an act of parliament, and certain land was allotted to *A.* in lieu of his said right of common: Held, that no tithe was payable in respect of the allotted land.

THE plaintiff declared in debt upon the statute 2 and 3 Edward 6. c. 13., as the farmer and proprietor of the tithes of corn arising from land in the parish of *Catherington*, in the county of *Southampton*, against the defendant as occupier of land in that parish, and charged that the defendant had carried away his corn without setting out the tithe, whereby an action had accrued to the plaintiff, to demand and have of the defendant treble the value of the said tithe. Plea nil debet. At the trial before *Graham Baron* at the Sumner assizes, 1819, for the county of *Southampton*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

The plaintiff claimed the tithes in question, as the tenant for an unexpired term of years, of Sir *Lucas Curtis*, the lay impropriator of the rectorial tithes of the parish of *Catherington*. By an inclosure act of the 50 G. 3. c. 218. for disafforesting the forest of *Bier*, in the county of *Southampton*, and for inclosing the open commonable lands within the forest, after reciting (section 41.) that the 600 acres of land thereby vested in his majesty, being taken out of different parishes, the persons entitled to the tithes of such parishes might be injured thereby, it was enacted, that out of the said open commonable lands thereby directed to be divided and inclosed, allotments should be made to the persons entitled to the tithes of such parishes, of so much land as should be in the judgment of the commissioners, a full

full compensation for such injury. And it was further enacted (section 42.) that the commissioners should, in the next place, allot the residue of the said open commonable lands and grounds respectively to, and among the persons entitled to commonage. "Provided, (section 43,) that nothing in the said act shall extend, or be construed to extend, so as to prejudice, lessen, or defeat the right, title, or interest of the several rectors, vicars, and lay impropriators of the several and respective parishes, townships, hamlets, or places of *Soberton, Hambleton, Catterington, &c.* or any person or persons whomsoever, in, or to any tithes, great or small, arising or renewing out, or payable for, or in respect of any lands, tenements, hereditaments, within the same several parishes, &c. but such great and small tithes shall be paid and payable, at all times hereafter, in such and the same manner as they would have been, in case this act had not been made." Before, and at the time of passing of this act of parliament, *John Ring* esquire was the owner of an estate at *Love Dean*, in the parish of *Catterington*, and the tithes arising from such estate, for which estate, as consisting of 120 customary acres of arable, pasture, and coppice land, in the occupation of *Edward Manns*, free from rectorial tithe, (but which tithe had been purchased with the estate,) situate, and being at *Love Dean*, in the parish of *Catterington*, he claimed a right of common from the commissioners under the foregoing act, who thereupon awarded to *Mr. Ring*, in right of the last mentioned estate, five acres and 17 perches of the open and commonable lands of the forest of *Bier*, situate in the parish of *Catterington*. The defendant, *John Manns*, became the tenant of two acres, part of such five acres and 17 perches so allotted

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against
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to Mr. *Ring*, and in the year 1817, sowed such two acres with oats, and afterwards cut and carried away the crop without setting out the tithe. The tithe was demanded, but refused, on the ground that, as the allotment had been made in respect of land not paying tithe, the allotted lands were exempt from the payment of tithe.

Selwyn for the plaintiff, contended, that he was entitled to recover. It does not appear, whether the right of common, in respect of which the allotment was made, was tithe free. The language of the conveyance might or might not be large enough to convey to Mr. *Ring* the tithes of the common. In *Lord Gwydir v. Foakes* (*a*) it was holden, that, by a grant of all tithes arising out of, or in respect of farms, lands, &c. the tithes arising out of, and in respect of common appurtenant to such farms or lands will pass. Here, however, no conveyance is stated, and it is rather to be collected from the language of the case, that the tithes of the estate alone, and not the tithes of the right of common appurtenant to such estate, had been purchased. If this view of the case be correct, it can hardly be contended, that the common being liable to the tithes, the allotment in lieu of it would be exempt. Indeed the contrary would follow, as appears from *Moncaster v. Watson*. (*b*) But admitting that the right of common were tithe free, would it be a necessary consequence, that the land allotted in lieu thereof should also be tithe free? The demand of the impropriator in the present case, is a demand of the tithe of corn. But

(*a*) 7 T. R. 641.(*b*) 3 Burr. 1375. 1 Bl. 402. S. C.

corn could not be part of what grew upon the common; the tithes that arose in respect of the common, could only have been tithes of agistment, or of lambs, calves, wool, milk, and other things that could be the produce of a common. Suppose the owner of a farm, liable to tithes of corn, and also to an agistment tithe; should agree with the person that he should hold his land free of agistment tithe, and afterwards, upon a demand made of the tithes of corn, should plead this agreement, it would hardly be considered as an answer to the demand. The case of *Stockwell v. Terry* (a) is distinguishable from the present; for there there was an express agreement, that the parties should enjoy their rights in severality, as they did their rights of common. And Lord *Hardwicke* in delivering his opinion, mainly relied on that agreement. Here there is no such express agreement, and none can be implied; for a claim of tithe can only be discharged by special words. *Perkins v. Hinde.* (b)

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E. Lawes contrà, was stopped by the Court.

ABBOTT C. J. I am clearly of opinion, that the plaintiff is not entitled to recover. The facts are these, *John Ring* being the owner of an estate of 120 acres, and the tithes arising therefrom, (which tithes he had purchased with the estate,) had allotted to him, under an inclosure act, certain land in lieu of a right of common appurtenant by custom to his estate. The plaintiff, who is the tenant of the lay impro priator, claims tithe in respect of such allotted land, and the question

(a) 1 *Ves.* 117.(b) *Cro. Eliz.* 161.

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substantially is, whether the lay impro priator, who has sold the tithe of the estate, is entitled to the tithe of land allotted to the owner of that estate, in lieu of a right of common which was appurtenant by custom to the land. It is quite clear, that after the lay impro priator had thus sold the tithes of the estate, no tithe was payable at least before the passing of the inclosure act. Before the sale, the tithe was payable equally in respect of all cattle feeding on the enclosed as on the common land. When the lay impro priator sold the tithes of the estate, he therefore sold all the tithes in respect of all cattle feeding, both upon the enclosed and the common land. And I am of opinion, that inasmuch as no tithe was payable before the inclosure act, in respect of the cattle feeding on the common land, no tithe is payable now in respect of the land allotted to the owner of the estate, in lieu of such right of common. This case is very distinguishable from the case of *Moncaster v. Watson* (a), for the land, in respect of which the allotment was there made, was not wholly free from the payment of tithe; the exemption claimed was merely from the tithe of corn, grain, and hay, neither of which the common, while uninclosed, was capable of producing. The tithe of agistment would therefore remain payable, notwithstanding the exemption. Here, the owner of the land is the owner of the tithes, for the effect of the conveyance must have been to make the owner of the estate the owner of all the tithes of the land, and I am of opinion, that the owner of the estate becomes the owner of the tithes of land allotted to him, in respect of a right of common

(a) *3 Burr. 1375.*

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appurtenant to that estate. The postea must therefore be delivered to the defendant.

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HOLROYD J. I am of the same opinion. I am quite satisfied, from the case of *Stockwell v. Terry*, and the reasoning of Lord Kenyon in the case of *Lord Gwydir v. Foakes* (*a*), that the plaintiff is not entitled to the tithes of the allotted land, but that the person who is entitled to the tithes arising out of the estate, is also entitled to the tithes arising out of the allotted land, in like manner as he would have been entitled to tithes arising out of the beneficial enjoyment of the right of common appurtenant to that estate, in case the inclosure act had never passed. (*b*)

BEST J. concurred.

Judgment for defendant.

(*a*) 7 T. R. 641.

(*b*) Bayley J. was absent at Chambers.

HUDSON against GRANGER.

Wednesday,
October 24th.

A SSUMPSIT for the price of coals. The declaration contained two special counts on a contract between the parties, and also counts for goods sold and

value, consigned them to him for sale: the factor being also similarly indebted to *I. S.*, sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between *I. S.* and the assignees, *I. S.* allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3. sess. 2. c. 28. s. 29., "All contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by *C.*, sold the same, and entered the contract in his book as having been made for *C.*, the master of the ship. It was not signed by the purchaser; but in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted: the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. Query, whether, under the circumstances, an action might be brought in the name of *C.* for the price of the coals.

The owner of goods being indebted to a factor in an amount exceeding their

delivered.

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delivered. At the trial before Lord *Ellenborough* C. J., at the sittings after *Michaelmas* term, 1817, a verdict was found for the plaintiff for 110*l.* 6*s.* 6*d.*, subject to the opinion of the Court on the following case:

The plaintiff was the owner or master of the ship *Maria*, and was employed in the coal trade by one *John Hallowell*, who was owner of the cargo of coals by that ship, a part of which was the subject of this action. The ship and cargo were addressed by *Hallowell* to *Robert Clark*, a factor. On the 10th of *April*, 1816, the defendant agreed with *Clark* to purchase of him part of the *Maria's* cargo, and in the contract entered by the factor in his book, the coals were stated to be purchased of *Robert Clark*, factor for *Hudson*, master or owner of the ship *Maria*. It was not signed by the defendant, or any person by him authorised, but in the copy delivered by the factor to the clerk of the market, the names of the defendant and of the factor were inserted at full length. By the 47 G. 3. sess. 2. c. 68. (local and personal) sec. 29., it is enacted, "that all contracts for coals between buyer and seller, shall, by the crimp factor, be fairly entered with the conditions thereof, and price of such coals, in a book to be kept by such crimp factor, subscribed by such buyer, and by the crimp factor, with their names written at full length, and a true and perfect copy of such contract, and the price of such coals, shall be delivered by such crimp or factor to the clerk of the market, within one hour after the close of the market on that day, for the inspection of any person." *Clark* was authorised by *Hallowell*, not only to sell, but to receive the price of the coals. *Hudson* had no interest in the cargo, and his name was inserted in the contract without his authority, it being

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the usual practice so to insert the name of the master. The coals were delivered to the defendant, pursuant to the contract. In *June*, 1816, *Clark* became a bankrupt. At the time of the purchase, *Clark*, who, for a considerable time, had had dealings with the defendant, was indebted to him in *272l. 5s. 4d.*, for money lent and advanced to, and paid for *Clark* in the regular course of business; and in the month of *January*, 1817, prior to the plaintiff bringing this action, an account was settled between the defendant and the assignees under *Clark's* commission, in which the assignees allowed the defendant to deduct the price of the coals from the debt due to the estate, and he then proved the balance under the commission. At the time of the sale of the coals, and continually from thence up to the time of the bankruptcy of *Clark*, *Hallowell* (who has also since become bankrupt) was indebted in a considerable sum to *Clark*, and after giving credit to *Hallowell* for the price of the coals on the *Maria*, the balance remained considerably in favour of *Clark*.

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F. Pollock for the plaintiff. This action is maintainable in the name of *Hudson*, because he was the person whose name was entered in the book of the factor, and also in the copy delivered to the clerk of the market. The defendant, therefore, might have learnt with whom the contract was made, and he cannot now be allowed to say, that the contract was not made with the present plaintiff. If the defendant had signed the contract, as required by the *47 G. 3. c. 68.*, there can be no doubt that the plaintiff might have sued. Assuming however, that the action was maintainable in the name of *Hudson*, the settlement which has taken place between
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the defendant and the assignees of the bankrupt, cannot operate as any answer to the present action, for admitting, that this case must be considered as if the action were brought in the name of *Hallowell*, this settlement took place after the bankruptcy of *Clark*, and, although a payment to him before his bankruptcy would have been a valid payment, as against his principal, because he had authority to receive the money, yet his bankruptcy was a revocation of that authority, and therefore the payment was not made to an agent authorised to receive it, and consequently is not a valid payment as against *Hallowell*.

Gaselee contra. The bankruptcy of the factor would certainly operate as a revocation of his authority to receive payment on account of his principal. Here, however the payment was made, not merely on the account of *Hallowell* alone, but it was made to *Clark* or his assignees, who stand in the same situation in respect of the lien which he had against *Hallowell*.

The Court were about to pronounce judgment, when

F. Pollock in reply, suggested, that *Clark* never had any lien in this case, because, by the provisions of the 47 G. 3. c. 68., coals must be sold while in the ship, except in the case of a sale to government; the property, therefore, immediately passes from the vendor to the vendee, and the factor, therefore, never had a possession so as to give him a lien.

(a) *BAYLEY* J. I am of opinion that the plaintiff is not entitled to recover. The stat. 47 G. 3. c. 68. sess. 2.

(a) *Abbott* C. J. was sitting at the *Old Bailey*.

was

was framed with the view, that coals which reached the market should not be warehoused for the benefit of the original sender of the coals, but that he should sell as soon as the ship arrived, or that the coals should be kept in the ship, and the ship thereby detained till an actual sale took place. The legislature did not intend by the provisions of that statute, to interfere with the rights of a factor. In this case, *Clark* is described as the factor of *Hallowell*. It seems to me, that when the coals arrived, the ship having been addressed to *Clark* as factor, and he having the complete control of the coals in that character, the ship is to be considered as the warehouse of *Clark*, for the coals then in the ship, and the coals are to be considered in his possession. If that be so, then the question is, whether that which has passed between the assignees of *Clark* and *Granger*, takes away from *Hallowell* the right to sue in *Hudson's* name; and it seems to me that it does. *Clark*, as factor, had a lien on every thing in his possession, and he therefore had a lien upon these coals. As factor too, he had a general lien, not only on the article when in his possession, but on the price of the article when sold, and having that lien, he may enforce payment to himself in opposition to the principal. That being so, *Clark* in this case sells to *Granger* the goods of *Hallowell*, who at that time was indebted to *Clark* in more than the price of these goods. The latter having a lien on the price, might insist that *Granger* should pay him, and that *Hallowell* should not receive the money. *Clark* afterwards becomes bankrupt, and his bankruptcy undoubtedly would have operated as a countermand of his authority, to receive the price on account of his principal; but it does not operate to destroy

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destroy his right to receive it on his own account in respect of his lien. That being the situation of the parties, the defendant afterwards comes to a settlement with the assignees of *Clark*, the effect of which was, that *Granger* paid to *Clark's* assignees the price of the coals, which *Clark* till his bankruptcy had a right to insist should be paid to him, and which his assignees had the same right to insist upon afterwards. It seems to me therefore, that this was a valid payment as against *Hallowell*, and that he cannot now, either in the name of *Hudson*, or in his own name, sue for payment a second time. Upon the other question, whether the action can be maintained in the name of *Hudson*, he having no interest in the contract, I entertain considerable doubt. If the defendant be bound to admit, that the contract was made by him with *Hudson*, then the latter would be the party entitled to sue. Now as *Hudson's* name was in the contract, and the defendant might have seen it, if he pleased, I incline to think that he is bound by the terms of the contract, and that he is not at liberty now to say, that *Hudson* was not the party with whom he contracted. It is unnecessary to pronounce any judgment upon that point, inasmuch as I am clearly of opinion upon the other ground, that there must be judgment of nonsuit.

HOLROYD J. It is unnecessary to decide in the present case, whether the action can be maintained in the name of *Hudson*; because, I am clearly of opinion upon the other point, that there must be judgment of nonsuit. It appears to me, that *Clark* was factor and not a mere broker; and that being so, I am of opinion, that he had a lien not only on the goods while they remain-

remained in his possession, but also on the proceeds of the goods which he sold as such factor. In *Drinkwater v. Goodwin* (*a*) it was expressly decided, that a factor who becomes surety for a principal, has a lien on the price of the goods sold by him for his principal, in the amount of the sum for which he has become surety, and Mr. Justice *Chambre*, in *Houghton and Others v. Matthews* (*b*), considers that as settled law. *Clark*, therefore, having a lien on the proceeds, had a right to receive the price from the buyer, and when he had so received it, to retain it as against *Hallowell*. The bankruptcy of *Clark* could not operate to destroy his right of lien, though it would operate as a revocation of his authority to receive any money on account of his principal. His assignees after the bankruptcy, had the same rights as the bankrupt had before. A payment made to *Clark* before his bankruptcy, even against the will of *Hallowell*, would have operated as a valid payment as against *Hallowell*, and a payment to his assignees afterwards must have the same effect. For these reasons, I am of opinion, that the settlement between *Clark's* assignees and the defendant operated as a valid payment, and consequently that this action cannot be maintained.

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BEST J. I am of the same opinion. This action is brought in the name of the present plaintiff for the benefit of *Hallowell*, and it must be therefore considered, as if it were brought by the latter. Now the facts are these: *Hallowell* sells the coals to *Granger*, by the means of *Clark*, his factor; *Hallowell* being then in-

(*a*) *Cowper*, 251.(*b*) *3 Bos. & Pult.* 489.

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debted to *Clark* beyond the price of the coals, *Granger* pays the money to *Clark*. Now, *Clark* as factor, having a lien on the coals, and on the proceeds when received, had a right to require that the money should be paid to him, and not to his principal, and he also had a right even to retain the money against his principal. The payment to *Clark*, or to his assignees, who stand in his place, was therefore a valid payment as against *Hallowell*, and is a good answer to the present action. It is unnecessary to decide, therefore, whether this action could be maintained in the name of *Hudson*, inasmuch as I am clearly of opinion, that upon the other point, there must be judgment of nonsuit.

Judgment of nonsuit.

Thursday,
October 24th.

RICHARD EATON, CHARLES HAMMOND, and

CHARLES HAMMOND, Jun. - Plaintiffs;

AND

HENRY BELL, CHARLES WEDGE, and JOSEPH

TRESLOVE, - - - Defendants.

An inclosure act empowered the commissioners to make a rate to defray the expenses

of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging of interest half-yearly was not unlawful on the ground of usury.

verdict

verdict was found for the plaintiffs. On a motion for a new trial on the part of the defendants, and on a motion on the part of the plaintiffs to have the compound-interest added to the verdict, the Court directed a case to be stated.

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A private inclosure act for allotting lands in the parish of *Fordham*, was passed in the 49 G. S., by which the defendants were appointed commissioners. This act provides "That the acts of two commissioners shall be as valid as if done by all. That new commissioners shall be appointed in case any of the first appointed commissioners should die. That the expences of passing and executing the act shall be paid by the proprietors in such shares and proportions as the commissioners shall direct. That the commissioners shall make a rate, and in case of non-payment, shall have power to levy the same, together with interest, by distress. That persons advancing money for defraying the expences shall be repaid the same, with 5 per cent. interest, out of the first monies that shall be raised by the commissioners." Mr. *Weatherby* was appointed auditor of the commissioners' accounts, which were to be examined and balanced by him at least once in every year, and no charge was to be binding or valid in law unless the same was duly allowed by him.

The plaintiffs were bankers at *Newmarket*. On the 1st of July, 1809, the defendants held their first meeting under the act, at which the plaintiffs were duly appointed bankers. They accepted the appointment, and acted as such. Various expences were incurred in the execution of the act before any rate was made upon the proprietors, such as making the new roads and drains. The defendants commenced drawing upon

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the plaintiffs in *October*, 1809, to defray these and other expences, and between that time and *June*, 1812, the plaintiffs had advanced 3329*l.* 18*s.*, without having received any money from the defendants. On the 5th of *June*, 1812, the defendants made a rate upon the proprietors to the amount of 8446*l.* 18*s.* 5*d.*, and in *Nov.* 1817, another rate, to the amount of 3845*l.* 8*s.* 4*d.*, a very considerable part of which sums remained unpaid. The account continued open until *December*, 1818, when a balance of 2240*l.* 14*s.* 10*d.*, including compound interest, as hereinafter mentioned, was due to the plaintiffs. During the whole of the time the plaintiffs were greatly in advance to the defendants. No interest was charged by the plaintiffs until *December*, 1811, when 145*l.* 8*s.*, the simple interest then due upon all the sums previously advanced, was added to the debt; and from *January*, 1814, half-yearly rests were made in the accounts, and the interest added to the principal sum advanced. The defendants generally held their meetings at *Newmarket*, where the plaintiffs reside; and the defendants, by themselves, their clerk or solicitor, were in the habit of taking their banking-book to the plaintiffs to have the account made up: each of the defendants did so from time to time, and no objection was ever made by the defendants to the charges for compound interest. It was the general practice of the plaintiffs to make such half-yearly rests. Mr. *Weatherby*, the auditor named in the private act, was not applied to by the defendants to audit their accounts until *December*, 1818, when the account for the balance of which this action was brought, was submitted to, and allowed by him. The drafts were in the following form: “*Fordham Inclosure, October 15th, 1810.*

Messrs.

Messrs. *Eaton, Hammond* and Son, pay *John Morgan*, or bearer, forty pounds, on account of the public drainage, and place the same to our account, as commissioners of the above inclosure." At the trial, the Chief Justice stated to the jury, that the question for them to determine was, whether credit was given by the plaintiffs to the defendants personally, or to the fund which they had power to raise. The jury found a verdict for the plaintiffs, damages 1957*l.* 15*s.*, deducting 282*l.*, the sum charged for compound interest, with leave for the plaintiffs to move to add that sum to the verdict, if they were by law entitled to recover it.

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Dover, for the plaintiffs. The commissioners are personally liable. They employed the defendants as their bankers. They borrowed the money, and had the means of paying it out of the rates which the act of parliament authorized them to raise. In *Horsley v. Bell* (a), a bill having been filed by the plaintiff, the undertaker of a navigation at *Thirsk*, in *Yorkshire*, against the commissioners named in the act for carrying it on, who had signed the several orders; it was contended, first, that the defendants were not personally liable, because they were exercising a public trust, and the credit was given to the undertaking itself, and not personally to them, and the remedy was therefore in rem; secondly, that those who had been present at the meetings, and had signed some, but not all the orders, were liable only to those which they had respectively signed. But Lord Chancellor *Thurlow*, assisted by *Ashurst* and *Gould* Justices, held, first, that the

(a) 1 *Brown, Ch. Ca.* 101. *Ambler*, 770.

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commissioners were personally liable; and, secondly, that they were all liable in respect of all the orders. Lord *Thurlow* says, "Who would make a contract on the credit of toll, which it is in the power of the commissioners to raise or not at their pleasure? Then, upon whose credit must the contract be? Certainly that of the commissioners who act. It is their fault if they enter into contracts when they have not money to answer them. They have made themselves liable by their own acts." That case is an authority to shew, first, that the commissioners are personally liable; and, secondly, that they are all liable for the orders given by the others. The defendants are liable to pay the compound interest charged in the account. It is clear that they assented to this mode of keeping the accounts, and therefore they must be liable, unless it be unlawful. Now, in *Bruce v. Hunter* (a) it was held, that an agent who had advanced monies for his principal, in effecting insurances and other mercantile business, was entitled to charge interest, and at the end of every year to make a rest, and add the interest then due to the principal. And in *Ex parte Bevan* (b), it was held by Lord *Eldon*, that although a contract *a priori* for a loan for twelve months, settling the balance at the end of six months, and that the interest should carry interest for the subsequent six months would be bad as a contract for more than 5 per cent. per annum interest: yet, if at the end of the six months the parties agree to settle the accounts, and strike the balance (that not being part of the prior contract), and to forbear the whole balance for the next six months, that practice is legal. That case is an

(a) 3 *Campb.* 467(b) 9 *Ves. jun.*

authority

authority to shew, that the mode of charging interest by making a rest at every six months, is not unlawful; and, consequently, plaintiffs in this case are entitled to recover the compound interest charged in the account.

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Robinson contra. In *Horsley v. Bell*, the commissioners had a power to defray their expences; and the Court held, that persons employed by them, might reasonably look to such money as a fund, and that it was the fault of the commissioners if they contracted engagements before they had the means of defraying them. Workmen could not be expected to give credit to the undertaking. But all these grounds for that decision fail here. The commissioners acted in furtherance of the very object of the legislature in borrowing this money, and the act expressly provides for the repayment of monies so advanced "out of the first monies that shall be raised by the commissioners." It would be a mockery to say to them, you shall not borrow till you have the means of repaying; for then, why should they borrow? The plaintiffs were appointed bankers by the proprietors, not the commissioners. They acted under the act. They must be taken to know its provisions. They advanced the money under the power given, and their own contract must be taken to be, that they were to be repaid out of the first monies. They were so repaid in part. They will be paid the remainder: but they cannot sue the commissioners in their personal character. It would otherwise be extremely unjust, for then the action would lie against the survivors, and the executors of the survivor of the old commissioners, and in the meanwhile the new com-

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missioners would possess themselves of the effects. This could not be the intention of the parties. The plaintiffs knew that the commissioners were not to pay out of their own pocket, and that brings the case within *Macbeath v. Haldimand* (*a*), *Unwin v. Woolseley* (*b*), *Rice v. Chute*. (*c*) As to the legality of making half-yearly rests, the modern cases certainly seem to sanction what looks like an infringement of the rule, that compound interest shall not be taken; but here is no express admission of the correctness of the accounts.

ABBOTT C. J. Upon principle, as well as upon the authority of the case of *Horsley v. Bell* (*d*), I am clearly of opinion, that the commissioners in this case were personally liable, that the question was properly submitted to the jury by the learned Judge, and that they have drawn a right conclusion. As to the question of compound interest, it is now settled, that a party advancing money to another is entitled to charge interest, and at the end of every year, then to add the principal to the interest. In *Ex parte Bevan* (*e*) it was expressly held, that although an antecedent contract for a loan for twelve months, to settle the balance at the end of six months, and that the interest should carry interest for the subsequent six months, would be bad; yet, that an agreement at the end of six months to settle accounts, (that not being part of the prior contract,) and then a stipulation to forbear the balance then struck for those six months, is legal. It is clear from the facts stated, that the defendants assented to that

(*a*) 1 T. R. 172.(*b*) 1 T. R. 674.(*c*) 1 East, 579.(*d*) 1 Brown, Ch. Ca. 101. *Ambler*, 707.(*e*) 9 Ves. jun. 223.

mode of keeping the accounts, and the bankers who advanced the money might have done it on the faith that they should have been permitted to convert the interest from time to time into capital; and that they would not otherwise have continued to make the advances. I think, that upon the authority of the case cited, the plaintiffs are entitled to recover the interest charged, and consequently that the verdict must be entered for the larger sum.

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EATON
against
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BAYLEY J. I am of the same opinion. The form of the draft is to pay *A. B.* or bearer on account of the public drainage. The persons therefore, who signed that order, assert that the money is to be applied to the purpose of the public drainage. The draft then goes on, "and place the same to our account as commissioners of the inclosure act." Therefore, the money is to be placed to their debit in the account, which they have *as* commissioners. It does not say, "place the same to the account of the inclosure," but "to our account *as* commissioners." (a) Now, the defendants must have known what they had collected, and what means they had of collecting more; and they ought to have taken care before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts. I think, therefore, that there must be judgment for the plaintiffs.

BEST J. (b) concurred.

Judgment for the plaintiffs.

(a) See *Burrell v. Jones*, 3 Barn. & Ald. 47.

(b) Holroyd J. was at Chambers.

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*Thursday,
October 24th.*VANSANDAU *against* BURT.

Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange for 692*l.*, dated 24th *April*, 1815, accepted by *Jackson, Goodchild, and Co.*, payable to the order of *J C.*, 70 days after date, defendant undertook, &c. ; and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant the bill, and all sums of money due thereon, to and for the defendant's own use; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill. Held, that the declaration imported that the plaintiff had made an absolute assignment of the bill, and consequently, that the assignment in evidence being only conditional, this was a fatal variance.

DECLARATION stated, that in consideration that plaintiff would assign to defendant a bill of exchange for 692*l.*, dated 24th *April*, 1815, accepted by *Jackson, Goodchild, and Co.*, payable to the order of *J C.*, 70 days after date, defendant undertook, &c. Averment, that plaintiff did assign the said bill of exchange to the defendant, &c. The bill mentioned in the declaration had been formerly assigned by the defendant to the plaintiff in part-payment of a debt, and the acceptors had since become bankrupts. Under these circumstances it was agreed between the plaintiff and the defendant that the former should give up to the defendant the bill in question, the latter requiring it for the purposes of some arbitration; but that the defendant should pay to the plaintiff from time to time such sums of money as should be equal to the dividends upon the sum of 692*l.*, which might become payable under the estate of the drawers, acceptors, or indorsers of the bill. In pursuance of this parol agreement a deed was executed between the parties, which, among other things, recited, that the defendant had requested the plaintiff to re-assign the said bill of 692*l.* to the defendant, which plaintiff had agreed to do upon the covenants in the indenture contained, and it was thereby witnessed, that in pursuance of said recited agreement plaintiff *did assign* to the defendant all the said bill of exchange, and this was a fatal variance.

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all sums of money due thereon, to and for the defendant's own use and benefit; and the defendant covenanted with plaintiff, that within seven days after every dividend which should be declared under the estate of the drawers, acceptors, payees, or indorsers of the said bill thereby assigned, the defendant would pay to plaintiff such sum of money as should be equal in amount to the dividend so to be declared on or in respect of the sum of 692*l.* 11*s.* without any deduction or abatement.

The Court now directed *Manning* to confine his attention to the point, whether there was any proof of the averment in the declaration, that the plaintiff had assigned the bill to the defendant. He now argued that there was evidence of an actual assignment of the legal property in the bill to the defendant, although the latter was bound by the terms of his agreement to pay to the plaintiff a sum equal to the amount of the dividends he might have received. Here the covenants in the deed of assignment do not amount to a condition, but are mere collateral and independent covenants.

ABBOTT C. J. The declaration states, that in consideration that the plaintiff would assign to the defendant a bill of exchange, the defendant promised to do a certain act therein mentioned. It is then averred, that the plaintiff did assign the bill to the defendant. It was therefore incumbent on the plaintiff to prove that he did so assign the bill. Now, any lawyer reading that allegation in this declaration would understand that the plaintiff was to assign the bill without any qualification, and for the sole benefit of the assignee. It appears, however, upon the facts stated in the case, that there

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was no assignment, but that the bill was merely given up to the defendant, who wanted it for a particular purpose, upon condition that the proceeds should from time to time be paid to the plaintiff. That is by no means the unqualified assignment which the declaration imports. If the declaration had stated as the consideration that the plaintiff had assigned to the defendant the legal interest in the bill, subject to a condition, that he was to pay the plaintiff the proceeds, the facts proved would have supported that averment. I am of opinion that here there was not any evidence of such an assignment; and, therefore, there must be judgment for the defendant.

BAYLEY J. The language used in this declaration imports the agreement to have been that the plaintiff should execute an unqualified and unconditional assignment. The real bargain, however, between the parties was, that he should execute an assignment, accompanied with this condition, that if the defendant should receive any dividends upon the bill he should pay the same over to the plaintiff. That is a qualified assignment, and is so described in the indenture which the parties themselves executed in pursuance of their agreement. It appears to me, therefore, that the consideration was untruly stated, and that a nonsuit ought to be entered.

BEST J. (a) The declaration alleges the consideration to be, that the plaintiff shall make an unconditional assignment of the bill of exchange to the defendant, by which it must be understood that the assignee of the bill was to have the whole benefit of it; whereas it appears,

Holroyd J. was at Chambers.

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in point of fact, that he was to derive no benefit, for he was to hand over the whole proceeds to the plaintiff. There is, therefore, a material variance in the consideration stated in the declaration and that given in evidence; and that being so, there must be judgment for the defendant.

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Judgment for Defendant.

SOLLY and Another *against* WHITMORE.

Thursday,
October 26th.

A SSUMPSIT of a policy of insurance upon the ship *Seemann*. At the trial before Bayley J. at the London sittings after Trinity term, 1820, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case :

On the 29th September, 1818, the defendant subscribed a policy of insurance upon the ship *Seemann*, and the risk was "at, and from Hull, to her port or ports of loading in the Baltic sea and gulph of Finland, with liberty for the ship in the said voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever for all purposes, particularly at Elsinore, without being deemed a deviation." The policy was effected by the plaintiffs, on behalf of James Phillips, who then resided at Konigsberg, in Prussia, and was the party interested in the insurance as owner of the ship. The ship, on the 3d October, 1818, began loading on board at Hull, sundry packages for Elsinore, sundry other packages for Dantzig, and sundry other packages for Pillau, and on the 23d October, in the same year, set sail from Hull on her voyage for Elsinore, Dantzig, and Pillau, the latter being her intended port

By a policy a ship was insured at and from Hull to her port, or ports, of loading in the Baltic sea and Gulph of Finland, with liberty to proceed to, and touch and stay at, any port or ports whatsoever, for any purpose, particularly at Elsinore, without being deemed a deviation. The ship touched and stayed at Elsinore and Dantzig, to deliver goods, Pillau being her port of loading : Held, that this was a deviation.

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of loading. The ship touched at *Elsinore*, and landed there the goods destined for that place; she afterwards sailed for *Dantzig*, and arrived there on the 15th *December*, 1818, and was delivering the goods destined for *Dantzig*, until the 19th *December*, 1818, when she proceeded to *Pillau* to deliver the remainder of her cargo. On the 21st *December*, 1818, the ship when in sight of *Pillau*, was totally lost by the perils of the sea. The premium mentioned in the policy was returned by the defendant to the plaintiffs before the commencement of the present action.

F. Pollock for the plaintiff, admitted, that it was now settled by the cases of *Rucker v. Allnutt* (*a*), *Langhorn v. Allnutt* (*b*), and *Hammond v. Reid* (*c*), that the liberty to touch at any port or place whatsoever for all purposes, must be taken to mean, for some purpose connected with the voyage. Here, the object of the voyage was, that the ship was to proceed from *Hull* to her port of loading in the *Baltic*. But it does not therefore follow, that she was to sail in ballast, and if she was to take goods, she might be permitted to deliver them at those ports, where, by the liberty reserved in the policy, she was permitted to touch and stay.

C. Puller, contra, was stopped by the Court.

ABBOTT C. J. The liberty given by this policy to touch at any ports for all purposes, must be construed to mean purposes connected with the voyage. Here, the voyage was from *Hull* to a loading port in the *Baltic*, and if the ship had gone to *Elsinore* or *Dantzig*

(*a*) 15 *East*, 278. (*b*) 4 *Townl.* 519. (*c*) 4 *B. & A.* 73.

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to see if she could get a cargo, that would have been a purpose connected with the voyage, and consequently would not have been a deviation. But the vessel, in fact, went to those ports for the purpose of delivering goods, which was wholly unconnected with the object of the voyage insured. I am therefore of opinion, that this was a deviation, and consequently, that there must be judgment of nonsuit.

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 against
 WHITMORE.

Judgment of nonsuit.

ELLIS against ARNISON.

*Friday,
October 27th.*

DECLARATION stated, that by an indenture, made 10th *February*, 1804, between the plaintiff of the one part, and the defendant and one *John Campbell* of the other part, the plaintiff demised unto the defendant and the said *John Campbell*, all the small or vicarial tithes and dues of what nature soever, yearly arising in respect of a certain piece or parcel of ground, situate in the parish of *East Moulsey*, in the county of *Surrey*, and all other the tithes belonging to him the plaintiff, as the incumbent of the living of the parish of *East Moulsey*, for and in respect of the said ground and premises. Habendum for 21 years, yielding and paying a yearly rent of 22*l.* Covenant to pay the rent. Breach, non-payment of rent for one year, ending at *Michaelmas*, 1818. Plea, that after making the indenture, and before the commencement of the time for which the alleged rent is supposed to have arisen by an act of the 55 G. S. for inclosing lands in the parishes of *East*

By an inclosure act it was enacted, that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed, unto the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were required to distinguish by their award the several allotments to the impropriate rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes:

Held, under this act, that the tithes were not extinguished until the commissioners made their award.

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East Mousley and West Mousley, in the county of *Surrey*, reciting, amongst other things, that there were in those parishes several commons and waste lands, and that *Lord Hotham* and *Sir G. H. F. Berkeley* were seised of the rectory inappropriate of *East Mousley*, and as such were entitled to all the rectorial tithes within the parish, and that the provost and fellows of *King's College, Cambridge*, were the patrons of the perpetual curacy of the parish of *East Mousley*, and that the Rev. *W. Ellis* was the curate thereof, and as such was entitled to all the small tithes within the parish; it was enacted, that *A. B. D.* and *J. D.* should be appointed the commissioners for setting out, dividing, and allotting the commons and waste lands within the parishes of *East* and *West Mousley*, and for putting the act into execution; and it was also further enacted, that the commissioners should set out, allot, and award unto the inappropriate rectors and curate of the parish of *East Mousley*, in lieu of all great and small tithes arising out of any part of the said commons and waste and other lands in the said parish, thereby intended to be divided, allotted, and inclosed, and for and in lieu of the tithes of all such gardens, orchards, pastures, woodlands, and other ancient inclosures in the parish, as were liable to the payment of tithes; and in lieu of all moduses, and all payments and compositions in lieu of such tithes, such several plots, parcels, and allotments of the said commons or waste or other lands as in the judgment of the commissioners should be in the whole equal in value to one-fifth part of all the land which was then arable, or which had been arable within seven years before the passing of the act; one-tenth part of all the woodlands, and two-seventeenth parts of all the other lands and

grounds

grounds within the parish which were liable to the payment of tithes; and the commissioners were required to distinguish and separate by their award the several allotments so to be made by them to the inappropriate rector and curate respectively; and the same allotments were thereby declared to be in full satisfaction and discharge of and for the said tithes and moduses, and all payments and compositions in lieu of tithes, if any, yearly issuing from or out of the said commons, waste, or other lands. The plea then stated, that the premises in the declaration mentioned were within the parish of *East Moulsey*, and were liable to the payment of tithes; and that, after making the said act, and before the 29th September, 1818, to wit, on the 27th September, 1816, the commissioners *did set out and allot* unto the inappropriate rector and curate of the said parish of *East Moulsey*, in lieu of all great and small tithes issuing out of the said commons, and waste and other lands in the said parish of *East Moulsey*, by the said act intended to be divided, allotted, and inclosed, and for and in lieu of the tithes of all such gardens, orchards, pastures, woodlands, and other ancient inclosures in the aforesaid parish, as were liable to the payment of tithes; and in lieu of all moduses, and all payments and compositions in lieu of such tithes, certain plots, parcels, and allotments of the said commons, and waste and other lands, as in the judgment of the commissioners were in the whole of the value mentioned and prescribed in the act, and which allotments were to be in full satisfaction and discharge of and for the said tithes and moduses, and all payments and compositions in lieu of tithes (if any), yearly issuing out of the said commons, waste and other lands. The plea then stated,

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that by means of the premises all the small and vicarial tithes and dues, yearly arising in respect of the said land and premises in the said declaration mentioned, ceased and determined, and were from thenceforth for ever extinguished, and are no longer payable for and in respect of the said ground and premises; and that all the rent up to the time of the extinguishment was paid by the defendant. Replication, after setting out other clauses of the act, stated that the commissioners had made no award. Demurrer and joinder.

D. F. Jones, in support of the demurrer. The question is, whether the tithes have not been extinguished by the allotment made by the commissioners under the act. That depends entirely on the construction of the act. The first part is directory to the commissioners, to set out, allot, and award lands in lieu of tithes: but the act expressly enacts, that the allotments are to be in lieu of tithes. Now the plea shews, that an allotment has been made, and, consequently, that the clergyman has received his compensation for his tithes, which are, therefore, extinguished. It is clear, that the act intended the clergyman to take a benefit before the formal completion of the award, and the fair construction of the act is that the inception of the perpetual curate's advantages under the inclosure, and the extinguishment of the tithes in lieu of which those advantages were given to him, should be coterminous. Under all inclosure acts, certain powers of occupation and of exercise of ownership are given, antecedently to the award to the persons to whom the allotments are made, and a variety of collateral arrangements are to be made before the award can be perfected. The section of the act on which

which the present question turns, must be taken to be framed with reference to this view of the subject, the first clause of the section is directory that the commissioners shall *set out, allot, and award*, but the subsequent clause, extinguishing the tithes, enacts, that the *allotments* shall be in full satisfaction, and discharge, omitting the repetition of the term "*award*." Therefore, though the commissioners are bound to *set out, allot, and award*, yet, inasmuch as the setting out and allotting conferred rights on the clergyman before the execution of the award, the extinguishment of tithes was intended to take effect upon the allotment, without waiting for the lapse of time, and the investigation and adjustment of other matters, that were necessarily to precede the formal execution of the instrument by the commissioners.

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J. Parke, contra, was stopped by the Court.

BAYLEY J. (a) I am of opinion that the plea cannot be supported. The question is, whether it appears upon the face of the pleadings, that the tithes have been extinguished by what has been done. By this private act, the commissioners are required to set out, allot, and award to the inappropriate rectors and curate, in lieu of all great and small tithes, certain plots, parcels, and allotments of the commons, &c.; and they are required to distinguish and separate the several allotments so to be made by them, to the inappropriate rectors and curate respectively, and the *same* allotments are thereby declared to be in full discharge of all tithes. Now, the compensation to the proprietor of the tithes is "the

(a) Abbott C. J. was sitting at the Old Bailey.

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same allotments," viz. the allotments set out, allotted, and awarded: that seems to me to be the plain meaning of the act of parliament, and this construction is fortified by adverting to what the general rule of law is upon this point with reference to new inclosures. Now, the freehold in the allotment does not vest in the person to whom the allotment is made before the award is executed; that point was so decided in the case of *Farrer v. Billing.* (a) Now, this plea states only, that the lands had been set out and allotted. It therefore does not shew that the tithe was extinguished, because, for that purpose, the allotments ought to have been awarded as well as allotted and set out. I think, therefore, there must be judgment for the plaintiff.

HOLROYD J. I am entirely of the same opinion. The thing which the act of parliament directs to be in lieu of tithes, is the ground which shall be set out, allotted and awarded by the commissioners. The question is, in this case, whether, by what has been done, the plaintiff has got that which, by the act of parliament, he was to have in lieu of tithes. It appears upon the plea, that a piece of ground has been set out and allotted, but not awarded, and therefore the plaintiff has not got that which was to be in lieu of his tithes. The subsequent part of the clause enacts, that the *same* allotments, (which word, by reference to the preceding words, must be taken to mean, the lands set out, allotted, and awarded,) are to be in full satisfaction and discharge of the tithes. Now the commissioners have made no award, and therefore the plaintiff has not got that which the latter part of the clause directs to

(a) 2 Barn. & Ald. 171.

He is in full satisfaction of the tithe. I think, therefore, there must be judgment for the plaintiff.

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BEST J. It would be a very hard thing on the curate of this parish, that he should be bound to give up his tithe before he has got the equivalent. Now he has not any equivalent till the award be made. After the allotment is made, any party interested in the lands to be allotted, may appeal to the sessions, and the allotments may then be altered before the final award is made. It would be most unjust, therefore, that an allotment, which is not a final adjudication, should be that which the curate is to have in lieu of tithes. I think that the words *same allotments* must be construed with reference to the preceding words, and therefore, that they must mean an allotment confirmed by an award. It does not appear in this case, that any award has been made, and therefore the plaintiff is entitled to our judgment.

Judgment for plaintiff.

**GARNETT and Another against WILLAN and
JONES.**

*Friday,
October 26th.*

THIS was an action on the case, brought by the plaintiffs against the defendants as common carriers, for hire from *London* to *Worcester*, to recover the

and *B.*, common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and carried by that conveyance a short distance; it was then taken out of the mail coach by a servant of the carriers, and left to be forwarded by another coach, of which *A.* was one of the proprietors, but in which *B.* had no concern, and the parcel was lost. The carriers had previously given notice that they would not be responsible for any package containing specified articles, or which, with its contents, should exceed 5*l.* in value, if lost or damaged, unless an insurance were paid: Held, that, notwithstanding this notice, the carriers were responsible for the parcel in question, in consequence of their having delivered it to be carried by another coach, of which one of the carriers only was proprietor.

A parcel which,
with its con-
tents, exceeded
5*l.* in value,
having been de-
livered to *A.*.

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 against
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value of a parcel delivered to the defendants, to be carried by them from *London* to *Worcester*, and alleged to have been lost. Plea not guilty. The cause was tried at the *London* sittings after *Trinity* term, 1820, before *Bayley* J., when the jury found a verdict for the plaintiffs, subject to the opinion of the Court on the following case:

The defendants, at the time of the delivery to them of the parcel, were the proprietors of the *Worcester* mail-coach, used by them as common carriers, for the carriage of passengers and goods for hire. The plaintiffs, who resided at *Worcester*, wrote on the 17th *September*, 1819, to their correspondents in *London*, desiring to have two pieces of sarsenet sent to them "by the return of mail." Such sarsenet, of the value of 45*l.* 0*s.* 5*d.* was accordingly packed up on the 18th *September*, 1819, and duly booked at the coach office, at the *Bull and Mouth* inn, from which the *Worcester* mail proceeds, "as for the *Worcester* mail-coach to *Worcester*." The parcel was accordingly, by the defendants, put into the *Worcester* mail-coach at the *Bull and Mouth* inn, and entered in the usual way-bill of that coach, as a parcel to be carried thereby from *London* to *Worcester*, and the same parcel was carried in the mail-coach, from the coach-office at the *Bull and Mouth* inn, to a place called the *Green Man and Still*, in *Oxford street*, at which the defendants have no office or servant, but where passengers and parcels are booked for the defendants' mail-coach, and there the same was taken out of the mail-coach, and left at the *Green Man and Still*, to be forwarded on the following day to *Worcester* by another *Worcester* coach, called the heavy coach, (in which the defendant *John Jones* had no interest,) and the entry in

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the way-bill of the mail-coach was altered accordingly. The parcel was afterwards lost out of the heavy coach, but it did not appear by what means. Before the parcel was so booked, and delivered to be carried to *Worcester* by the mail, the defendants had caused the following public notice to be given, and the plaintiffs had notice thereof. "Take notice, that the proprietors of the public carriages, who transact their business at this office, will not be answerable for any package containing cash, bank notes, bills, jewels, plate, watches, lace, silks, or muslins, however small the value, nor for any other package which, with its contents, shall exceed 5*l.* in value, if lost or damaged, unless the value be specified, and an insurance be paid over and above the common carriage, when delivered here, or to any of their offices or agents in the different parts of the kingdom."

Chitty was to have argued for the plaintiff, but the Court called upon

F. Pollock, contra. The defendant is exempt from all responsibility for this loss, by the express terms of his notice, for the parcel has been lost. The object of these notices is, to protect the carrier from all losses arising from the default of his servants, unless the goods be insured. It is not unreasonable, that, with respect to parcels of value, carriers should require an additional compensation in proportion to the risk they run, and there can be no doubt, that, by the law of *England*, carriers may by such notices limit their responsibility. In *Nicholson v. Willan* (*a*), a parcel above the specified value of 5*l.* was delivered by the carrier, to be carried

(a) 5 East, 507.

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by the mail. The proprietors in that case were proprietors both of a mail and a heavy coach, going the same road from *Nottingham* to *London*; the parcel was accepted by them to be carried by the mail. It was, however, booked for the heavy coach, and afterwards lost, but it did not appear whether it was lost in a course of conveyance by the coach, or out of the warehouse. It was there held, that the parcel was to be considered as a parcel *lost or damaged* within the meaning of those words in the notice, and that the carrier, therefore, was exempt from responsibility. That case is an authority expressly in point to shew, that the present defendants are not liable.

BAYLEY J. (a) I am of opinion that the plaintiffs are ~~not~~ entitled to recover. A carrier is entitled to have a compensation in proportion to the value of the article entrusted to his care, and the consequent risk which he runs. He may, therefore, by a special notice, limit his responsibility to a reasonable extent. The notice given in this case was, that the carrier would not be answerable for parcels containing certain specified articles, nor for any parcel above the value of 5*l.*, if lost or damaged, unless an insurance were paid. The question then is, what is the fair meaning of the words "lost or damaged." In their largest sense, they would comprehend any case where the goods were lost or damaged by the wilful act of the carrier, or of his servant, even if he threw away the parcel entrusted to his care. For, in that case, it certainly might be said to be lost. It seems to me, however, that that is not the fair and reasonable construction of those words in this notice. Such a construction would certainly be wholly incon-

(a) Abbott C. J. was at the *Old Bailey*.

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sistent with several decided cases, to which I shall presently refer. The true construction of the notice seems to me to be this, that the carrier is not to be protected by the words lost or damaged, if he divests himself wilfully of the charge of the parcel entrusted to his care; because, he thereby divests himself of his character of carrier of the thing intrusted to his care. The words lost or damaged ought to be qualified thus: "the carrier himself doing nothing by his own voluntary act, or the act of his servants, to divest himself of the charge of carrying the goods to the ultimate place of destination." It has been said, that the object of this notice was, to exempt the carrier from all responsibility for the acts of his servants. That, however, is not the object expressed in the notice, and it has been held in many cases, that a carrier is responsible for the want of care and diligence of his servants. In *Smith v. Horne*(a), a parcel having been sent from *Worcester* to *London*, arrived in *London*, and was taken from the coach-office of the defendants in a cart, under the direction of *one* person only, for the purpose of delivery; the servant left the cart unprotected in the street, while he went to different houses for the purpose of delivering other packages, and the parcel, the subject of the action, was lost out of the cart. The Court were of opinion, that the carrier, notwithstanding his notice, was liable, and that the words lost or damaged did not apply to a case of that description. In that case, the carrier, by leaving the cart in the unprotected state which he did, liable to be pillaged by any dishonest person, might be considered to have divested himself of the charge of car-

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(a) 2 *B. Moore*, 18.

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rying it to its ultimate place of destination, and there, too, the loss accrued from the act of the servant. In *Bodenham v. Bennett* (*a*), the carrier by his servant had carried the parcel beyond the place of its destination, and it was lost. The Court of Exchequer, after great consideration, were of opinion, that the carrier was not protected by the terms of the notice, upon the principle, that, at the time the loss accrued, the carrier was not carrying it to its place of destination, but, by a wrongful act of his own, had divested himself of the charge of it, on its way to the place of destination. In *Birkett v. Willan* (*b*); a parcel of indigo was sent by a carrier, directed to a person at *Exeter*, and it was delivered by the book-keeper at the coach-office to a person who applied for it, but who had no right to receive it. In that case, there was a wrongful delivery by the act of the servant. The Lord Chief Justice at the trial was of opinion, that the carrier was protected by the terms of his notice, but the Court, upon a motion for a new trial, and after argument, were of opinion, that that being a case of gross negligence, was a loss not protected by the terms "lost or damaged" in such a notice. Now in that case, the carrier, by a wrongful act of his servant, had divested himself of the charge of carrying the parcel to its ultimate place of destination; for it was his duty to carry it to the house of the person for whom it was intended at *Exeter*, if he found the person to whom it was directed, or to keep it in order to make due inquiry to find him out. These cases are authorities to shew, that the terms lost or damaged in these notices, are to be understood in a limited sense, and it

(*a*) 4 Price, 51.(*b*) 2 B. & A. 356.

seems

seems to me, that the courts have put a sound construction upon those words *lost or damaged*, by which the carrier will receive all the protection which he ought to receive, for he will thereby be exempt from those peculiar liabilities which attach to him only in his character of carrier, but not from the consequence of his own misfeasance, for which every bailee is responsible. In this case, the defendants, *Willan and Jones*, received the parcel to be carried by them. Their coach arrives at the *Green Man and Still*, and the parcel is then, by their concurrence, put out of their possession, and delivered to a different person. Now, when the plaintiff sent his parcel by *Willan and Jones*, he had a right to have the care and attention of both those persons, and when he had the care and attention of one only, he had not that care and attention for which he originally contracted. *Willan and Jones* have therefore, by the act of their servant, divested themselves of the charge of carrying this parcel to its ultimate place of destination, and upon that principle, I am of opinion, that they are not protected by their notice. We have been strongly pressed in argument by the case of *Nicholson v. Willan*. (a) That case, however, is plainly distinguishable from the present. There the defendant was the owner of two coaches, a mail and a heavy coach, going to the same place, and the parcel was delivered for the purpose of being sent by the mail. It was not proved that it was in fact put into either coach, but, by an entry in the defendant's books, it appeared, that he had intended to send it by the heavy coach. The parcel was lost, but whether out of the

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(a) 5 East, 507.

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warehouse, or in the course of conveyance, does not appear. In that case, the carrier had not done any thing to divest himself of that parcel in his character of the proprietor of the mail-coach, and he might afterwards have sent it by the mail, notwithstanding the entry in the book. That case, therefore, cannot govern the decision of the present, and I am therefore of opinion, upon principle as well as authority, that the plaintiffs are entitled to our judgment.

HOLROYD J. I am of opinion, upon principle as well as upon the authority of decided cases, that a carrier, notwithstanding his notice, is responsible for any loss or damage arising in the course of the trust reposed in him, either from his own personal misconduct or that of his servants. The substance of the notice in this case is, that the carrier will not be responsible in certain specified cases, if the goods be *lost or damaged*, unless they are insured. Having given this notice, the defendants receive the parcel in question, to be carried by them by a particular carriage. It is so entered by them in their book, and is taken a part of the way, and is then delivered over by one of their servants to be carried by another conveyance. It must, therefore, be taken to have been delivered over by them with the knowledge that it was to go by the mail from which it was removed, for the way-bill was altered after the parcel had been put into a course to go by that coach. The words "*if lost or damaged*," in my opinion, apply only to a loss or damage arising from any negligence or misconduct in the carriage of the goods. Here the loss arose from a wrongful act of the defendants, wholly inconsistent with the contract they had entered into to carry the parcel, for the

the consequences of which they are answerable. Suppose, after having received the parcel, that, instead of carrying it, they had refused to do so, and wilfully suffered it to remain in their warehouse in town; that would clearly be a breach of the undertaking to carry it to its ultimate place of destination, and would constitute a wrongful act, for the consequences of which the defendants would be responsible. In this case they did take the parcel part of the way, and then removed it into another carriage. The action here is founded upon that misdelivery, and not upon any thing arising in the course of the carriage of the goods which they had undertaken to convey; but for doing an act quite inconsistent with that for which they had stipulated. The delivery of it over to another coach, when they had undertaken to carry it by their own coach, was a wrongful act on their part, which makes them responsible for the consequences arising from that misdelivery. Besides the cases already referred to by my Brother *Bayley*, the case of *Beck v. Evans* (*a*) is a strong authority to shew, that a carrier, notwithstanding these notices, is responsible for the negligence of his servant. There the carrier received a cask of brandy, which leaked in the course of the journey; the waggoner was informed of it, but took no step to prevent the leakage, and a considerable quantity of the brandy was lost; and it was held that the carrier, notwithstanding his notice, was responsible, on the ground that the loss accrued from the gross negligence of the servant. So, too, in *Ellis v. Turner* (*b*), the goods were sent by water to be carried to *Stockwith*, and they were carried beyond the place,

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(*a*) 16 *East*, 247. (*b*) 8 *T. R.* 531.

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and the vessel was afterwards lost; the Court held, that the carriers, notwithstanding the notice, were responsible; and in that case the loss happened, not from the miscarriage of the goods, but from carrying them beyond the place at which they had undertaken to deliver them. As to *Nicholson v. Willan*, it is perfectly consistent with the circumstances stated in that case, that the parcel may have been lost out of the warehouse, or even that it may have been sent by the mail; and Lord *Ellenborough*, in delivering the judgment of the Court in that case, expressly states, "that the mere fact of the booking of the goods for a different coach, and a subsequent non-delivery, could amount to no more than a negligent discharge of their duty in their character of carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeazance in respect of the goods in question." In the present case, there was a renunciation of that character; for the putting of the parcel into another carriage, when they knew that it was to go by their own, and when they had in fact carried it part of the way, was an act done in direct contravention of the undertaking which they had entered into; and therefore was a wrongful renunciation of their character of carriers; for all the consequences of which they are, in my opinion, responsible. In the case of *Bodenham v. Bennett* (a), Mr. Baron *Wood*, speaking of these notices, said, "These special conditions were introduced for the purpose of protecting carriers from extraordinary events; but they were not meant to protect them from due and ordinary care; be-

(a) 4 *Price*, 34.

sides,

sides, this case does not come within the terms of the notice; for here the box was not lost or damaged, but it was mis-delivered." Now, in this case the loss arose both from the want of due and ordinary care, and from doing an act in contravention of their duty and undertaking; and besides, in this case, too, the parcel was mis-delivered, by having been delivered to another carrier. Upon these grounds, and upon the authority of the cases to which I have referred, I am of opinion that the defendants are responsible for the value of the property lost in consequence of the wrongful act of their servants, who delivered it over to another carrier to be carried by his coach, instead of that of the defendants.

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HEST J. Admitting that there is a distinction between negligence and misfeazance, I think that the plaintiffs are clearly entitled to recover; because it appears to me that this is a case of misfeasance. Upon the other point I have lately said so much, that it will be only necessary for me to say, that nothing which has since occurred has induced me to alter my opinion. (a) I cannot see, with reference to the question of the responsibility of the carrier, that there is any sound distinction between negligence and misfeazance. I am of opinion, that by the common law a carrier is answerable for the negligence, as well as the misfeazance of his servants. The case of *Nicholson v. Willan*, which has been strongly pressed in argument, for the reasons already stated, is not an authority in favour of the defendant; but if it were, I think that the authority of that case is considerably shaken by the case of *Birkett v. Willan*, where the decision of the Court proceeded ex-

(a) *Batson v. Donovan*, 4 Barn. & Ald. 21.

pressly

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pressly on the ground that the carrier was liable for gross negligence. I am of opinion, that by these notices the carrier is only protected from that responsibility which belongs to him as insurer; that is a principle which all mankind can understand; and I think that we ought, in such cases as these, to lay down rules which may be easily comprehended by the great body of the public. For the reasons already given, I am of opinion that the plaintiff is entitled to recover.

Judgment for Plaintiff.

Friday,
October 26th.

DOE, on the joint and several Demises of JOHN ANNANDALE, DAVID ANNANDALE and JAMES ANNANDALE, and THOMAS DEWELL and FRANCES, his Wife, - - - - Plaintiffs;

against

CHARLES BRAZIER, - - - - Defendant.

A testator, by his will, bequeathed the rents of one dwelling-house situate in A. to C. B. for his life; and from and after the decease of the said C. B., he bequeathed the same rents, *together with* the rents of all his other houses and lands, unto his nephews and niece therein mentioned, for their lives and the life of the survivor; and after the decease of the survivor of them, he gave and devised all his houses and lands to trustees, in trust to sell the same, and to pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estate to C. B.: Held, that upon the death of the testator, the nephews and niece took an immediate estate, for their lives and the life of the survivor, in the rents of all the houses and lands, except the house specifically bequeathed to C. B. for his life.

and

and testament: I give and bequeath unto my son-in-law, *Charles Brazier*, the rents, issues, and profits of my messuage, tenement, or dwelling-house, situate in *New Brentford*, in the county of *Middlesex*, for the term of his natural life; and from and after the decease of the said *Charles Brazier*, I give and bequeath the same rents, issues, and profits, *together with* the rents, issues, and profits of all other my messuages or tenements, lands, hereditaments, and premises, situate, and being in *New Brentford* aforesaid, unto my three nephews, *John Annandale*, *James Annandale*, and *David Annandale*, and my niece, *Frances Annandale*, for their *respective* natural lives, and the life of the longest liver of them, share and share alike, and from, and immediately after the decease of the survivor of them, my said nephews and niece, I give and devise all, and singular, my said messuages or tenements, lands, hereditaments, and premises, unto *Christopher Pcel* and *George Clark*, their heirs and assigns, for ever, upon trust, to sell the same premises, and to pay over the produce of such sale unto such of the children of my nephews and nieces as shall be living at the time of the decease of the survivor of them. I give and bequeath unto the said *Charles Brazier* 100*l.* stock in the four per cent. consols, for his own use and benefit, and I give and bequeath unto him, the said *Charles Brazier*, all my household goods, plate, linen, china, and all other my estate and effects whatsoever and wheresoever. To hold the same unto the said *Charles Brazier*, his heirs, executors, administrators, and assigns for ever. The premises for which this ejectment was brought, were the messuages, tenements, lands, hereditaments, and premises mentioned in the testator's will,

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situate and being in *New Brentford*, (save and except the house mentioned as then in the occupation of *R. Tunstall*,) and expressly devised to the said *Charles Brazier* for the term of his life, and of which the testator died seized. The defendant, *Charles Brazier*, is the son-in-law of the testator, and the residuary legatee and devisee mentioned in his will, and was at the time the ejectment was brought, and still is, in possession of the premises sought thereby to be recovered. The lessors of the plaintiff (the *Annandales*,) were the surviving nephews of the testator, and legatees mentioned in the above will. *Thomas Dewell*, the other lessor, intermarried with the niece. The lessors of the plaintiff were not the heirs at law of the testator.

The question for the opinion of the Court was, whether the lessors of the plaintiff were entitled under the will to the premises belonging to the testator, situate in *New Brentford*, during the life of the defendant.

Treslove was to have argued on the part of the plaintiffs, but the Court called upon

Chitty, contra. No interest passed to the nephews and niece of the testator by this will, until after the death of *Brazier*. The testator, after giving one house for life to the defendant, proceeds, "and from and after the decease of *C. Brazier*, I give and bequeath the same rents, &c. together with the rents, &c. of my other houses, to my nephews and niece." Now it is perfectly clear, that the latter could take no interest in the one house bequeathed expressly to the defendant, until after his death, and the words, together with, cannot be rejected from the will, and if they be allowed to stand, then

then they refer not merely to the bequest, but to the time when the bequest is to take effect. The will operates therefore as a specific devise of specific property, to take effect only upon the death of *Brazier*. That being so, and as the trustees named in the will took no estate until after the decease of the survivor of the nephews and niece, the life interest in all the testator's houses in *New Brentford*, passed to the defendant under the residuary clause in the will.

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BAYLEY J. (a) We have no right to make a will for a party, but it is our duty to look to the whole of the will, and to extract from it what, on the fair construction of the will, appears to have been the intention of the testator. And of the intention of the testator, in this instance, I have no doubt. It seems to me, that his object was to give one house to *Charles Brazier*, and to give the reversion of that, and the immediate possession of all his other houses, to his nephews and niece for their respective lives. If the words, "and from and after the decease of the said *Charles Brazier*," be confined in construction to what had before been given to *Charles Brazier* for life, then there is no difficulty in the construction of the will. The proper way of reading it is this, "I give to my son-in-law, *Charles Brazier*, that house, and after his decease, I give and bequeath the rents, issues, and profits of that house to my three nephews and niece, together with the rents, issues, and profits of my other houses," applying the words "together with" as a repetition of the words of gift and bequest; not meaning to postpone the interest in the other houses till after the decease of *Brazier*, but giving to him the immediate interest in

(a) *Abbott C. J. was sitting at the Old Bailey.*

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that house. It might happen in the course of events, according to the construction contended for, that every one of these persons might be disappointed, because, if *Charles Brazier* survived them, they would take (according to that construction) no interest at all in any of the houses, and their children even would take no interest until *Brazier* died; nor until that event happened, would the trustees be entitled to sell. Whereas they are directed to sell immediately after the death of the survivor of the nephews and niece. Such a construction, therefore, seems to be at variance with the provisions of this will. The case of *Cooke v. Gerard* (*a*) is an authority in point. In that case, the testator had two estates, one in possession, and another in reversion expectant on the death of *A. B.* He devised the former to his widow for one year, and then he devised both to the lessors of the plaintiff, to hold immediately after the expiration of the year from his decease, and the decease of *A. B.* Therefore, the lessor of the plaintiff was, according to the words, to hold from, and immediately after the expiration of one year after the death of the testator, and the decease of *A. B.* The question was, whether the whole was postponed until after *A. B.* died. The Court decided not, but that the words were to be taken distributively, and that "after the decease of *A. B.*," was only to be applied to that estate in which *A. B.* had an interest. And so in this case, these words, "after the decease of *Charles Brazier*," may fairly be confined to that house, the rents, issues, and profits of which had previously been given to *Charles Brazier* for his life; but as to the residue, it is a present and immediate devise.

(*a*) 1 *Saund.* 181.

HOL-

HOLROYD J. I think that we should defeat the manifest intention of the testator, if we were to decide this case in favour of the defendant. It seems to me, that at the very time when the testator was devising one house to *C. Brazier*, he had in his mind his other real property. For, immediately after giving the life estate in the one house to the defendant, he goes on and says, and from, and immediately after the decease of the said *C. Brazier*, I give the said rents, issues, and profits, together with the rents, issues, and profits of my other houses, to my nephews and niece. It is clear, that the testator meant *Brazier* to take a life estate in one house only, and yet that he meant in this part of the will to dispose of his property in the other houses. Now, that intention of the testator cannot be effected without giving an immediate interest in the latter to his nephews and niece. It is said that the words "together with" incorporate not only the gift, but the time when that gift was to take effect. I think, however, that it was the manifest intention of the testator in this case, that these words should apply only to the gift, and not to the time when that gift was to take effect. I think it quite clear, therefore, that the testator in this part of his will intended to give an immediate estate for the lives of his nephews and niece, and the life of the survivor, and therefore, that there should be judgment for the plaintiff.

BEST J. I am of the same opinion. It is evident that the testator did not intend, that the defendant, to whom he had expressly devised one house, should take an immediate interest in the other houses, and it is equally clear, that he did not intend these houses to

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go to his heirs at law; for he has, by the residuary clause, given away all his estates whatever. Then if he intended, that these houses should not go to the defendant or his heirs at law, it is quite clear, that he must have intended, that they should immediately upon his death go to his nephews and niece. It has been said, that the words "together with" must necessarily refer to the time when the gift is to take effect. Looking, however, to the whole context of this will, I think that we shall best attain the intention of the testator by construing those words to refer to the property bequeathed, and not to the time when the bequest is to take effect. I think, therefore, that there must be judgment for the plaintiff.

Judgment for the plaintiff.

*Friday,
October 26th.*

CAZENOVE and Another, Assignees of POWER and WARWICK, Bankrupts, *against* PREVOST and Others.

A., a foreign merchant, purchased in his own name, but on account and

ASSUMPSIT by the plaintiffs, as assignees of the estate and effects of *J. Power* and *R. Warwick*, of London, merchants, against the defendants, who were

of *B.*, a British merchant, certain bank shares in the French funds. The latter drew bills upon *A.*, which he accepted, on the security of those shares standing in his name; and these bills were assigned by *B.*, for a valuable consideration, to *C.*, a British subject. Before they became due, *B.* authorised *A.* by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, *A.* had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; *B.*, also, afterwards became bankrupt. *C.*, by process in the foreign country, attached the bank shares still standing in the name of *A.* for the debts due to him upon the bills; and the court there decreed that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from *B.* to *A.*, and afterwards to retire the bills. Under this decree, *C.* received a certain sum of money on account of the bills: Held, that the assignees of *A.* could not recover back this money as money belonging to *B.*

mer-

merchants, also resident in *London*, to recover from them 1346*l.*, as money had and received by them, to the use of the plaintiffs, as such assignees. Plea, general issue. The cause was tried at the *Middlesex* sittings, before *Abbott* C. J., when a verdict was found for the plaintiffs, subject to the opinion of the Court, on the following case.

In *June*, 1818, *Martin de Puech* and Co., of *Paris*, by the directions of the bankrupts, purchased in their own names, but on the bankrupts' account, 25 bank shares in the *French* funds, and at the same time drew two bills of exchange upon the bankrupts, for the price of such shares, which the bankrupts duly accepted and paid. On the 2d *October*, 1818, the bankrupts drew upon *Martin de Puech* and Co. three bills of exchange, amounting together to 40,000 francs, payable three months after date, which the defendants purchased of the bankrupts, and gave them the value for in money, amounting to 1616*l.* 3*s.* 3*d.*, which bills *Martin de Puech* and Co. accepted, upon the security of such bank shares, which were then standing in their names, and which were the only funds in their hands belonging to the bankrupts. On the day the bankrupts drew these bills upon *Martin de Puech* and Co., they wrote them a letter, advising that they had drawn the bills, and stating, that in case the bank shares should not ultimately produce the sum for which the bills were drawn, they would be responsible to them for the deficiency; and on the 1st of *January*, 1819, the bankrupts, by another letter, authorised *Martin de Puech* and Co. to sell the twenty-five bank shares, in order to enable them to reimburse themselves what they had to pay in respect of the bills. On the 31st *December*, 1818 (two days be-

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fore the bills became due) *Martin de Puech* and Co. stopped payment, the bank shares then remaining in their names, and the bills were all dishonoured by them, and also by the bankrupts. At the time the Defendants took these bills of exchange of the bankrupts, they did not know that *Martin de Puech* and Co. had the twenty-five bank shares standing in their names belonging to the bankrupts, nor were they informed thereof, until *Martin de Puech* and Co. had suspended their payments. A commission of bankrupt issued against *Power* and *Warwick* on the 13th of *January*, 1819, and an assignment of their estate and effects was duly made to the plaintiffs on the 2d *February*, 1819. The defendant, *Prevost*, being then at *Paris*, on the 2d *March*, 1819, issued process of attachment, according to the laws of *France*, against the twenty-five bank shares in the hands of *Martin de Puech* and Co., under which attachment one of the plaintiffs, *Fermin de Tastet*, who was then in *Paris*, on the 27th of *May*, 1819, was duly summoned, but did not appear, and the other plaintiff, *Cazenove*, being in *London*, on the 9th of *July*, 1819, received notice of the proceeding at *Paris*, but never interfered therein. Upon the hearing of the attachment, on the 12th *August*, 1819, the Court decreed, that the bank shares should be sold, and the net proceeds applied, so far as they would extend, to pay a balance of 1570 francs, due by the bankrupts to *Martin de Puech* and Co., and after payment thereof, to retire the bills so accepted by *Martin de Puech* and Co. in favour of the bankrupts. The sum of 1346*l.* was in consequence received by the defendants, on the 30th *December*, 1819, as the produce of the bank shares, after deducting from such produce the 1570 francs, and the costs of the proceedings under the attachment,

ment, and there was still due to the defendants a further balance, in respect of the three bills of exchange, which they claimed to prove under the commission issued against *Power* and Co. *Martin de Puech* and Co. settled with all their creditors, and paid them the sum of 4*s.* in the pound, on the amount of their respective debts, in discharge thereof, which the defendants have accepted of *Martin de Puech* and Co., in respect of other demands they had on them, but they were not admitted creditors on their estate for these three bills of exchange.

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Platt, for the plaintiff. The assignees are entitled to recover this sum of money as money belonging to the bankrupt, of which the defendants have obtained possession since the act of bankruptcy. The legal interest in the bank shares was vested in the bankrupts. When, therefore, they were converted into money, their produce was money had and received to the use of the assignees. If the question had been between *Martin de Puech* and Co. and the plaintiffs, it might be urged that the produce was subject to the same lien as the bank shares; but even in that case, the lien could only attach upon payment of the bills by the *French* house. Admitting, however, that the lien would have been available between those parties, still it is not competent for the defendant to take advantage of it; for a lien is a personal, and not a transferable right. The *French* house could not avail themselves of the lien, as they had not paid the bills; and even if they could, as between them and the plaintiffs, still they could not transfer their rights to the defendant. By the stat. 1 Jac. 1. c. 15. s. 13., power is given to the commissioners to assign all debt

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debts due to the bankrupts for the benefit of the creditors, and then it enacts, "neither shall the *same* be attached as the debt of the bankrupt." Now, here the bank shares have been attached as the debt of the bankrupt; and that is against the express provisions of the statute. This is not like the case of a fund appropriated to particular purposes at the time of accepting the bills; for in such a case a power is given by the owner to the appropriating party, and unless that power is strictly complied with, the owner is not bound by the appropriation. In this case, the proceeds were applied, first, to liquidate the general balance due to the *French* house, which was not within the scope of the trust reposed in them. Here, therefore, one creditor has obtained an undue advantage over the others, by attaching the debt due to the bankrupts, which is against the policy and provisions of the bankrupt laws.

Tindal, contra, was stopped by the Court.

BAYLEY J. (a) This case has been argued very forcibly on the part of the assignees. There is no difficulty, however, as to the principle of law applicable to the case. The assignees are unquestionably entitled to all the property that belonged to the bankrupt at the time of his act of bankruptcy: and there can be no doubt, also, that if a subject of this country, by means of legal process abroad, gets into his hands, after the bankruptcy, money belonging to the bankrupt, he is liable to refund it to the assignees. The question in this case is, whether the property in question was, at the time of the bankruptcy, the property of the bankrupts.

(a) Abbott C. J. was sitting at the *Old Bailey*.

Before

Before the bankruptcy, *Martin de Puech* and Co. had standing in their names in the *French* funds 25 bank shares belonging to the bankrupts. On the faith of those bank shares, the bankrupts were allowed to draw on the *French* house, and the latter accepted the bills; the legal consequence of which was, that it entitled them to keep those shares as a security against the liability they had incurred by their acceptances. On the 1st of January, 1819, the bankrupts authorize the *French* house to sell the shares. So that, at the time of the act of bankruptcy of *Power* and *Warwick*, the *French* house was under acceptances for the bankrupts, with certain bank shares in their names, which they had the power to sell. Under these circumstances, *Prevost*, one of the defendants, the holder of the bills, on the 12th August, 1819, instituted a suit in the *French* court, in the course of which process of attachment issued against these 25 bank shares. At that time the bank shares stood in the name of *Martin de Puech* and Co., and they had a right to sell them, and apply the proceeds in discharge of their acceptances. The bankrupts could not call on the *French* house to give up any part of that money until they had released them from all liability in respect of those acceptances. The *French* Court made a decree, that the bank shares should be sold, and that the proceeds should be applied, first, in payment of the general balance due from the bankrupts to *Martin de Puech* and Co., and that the residue should be specifically applied (not as the money of the bankrupts) to retire the bills, and it was so applied accordingly. At the time when the bank shares were standing in the names of *Martin de Puech* and Co., the bank might be considered as a stake-holder, the two houses having an interest

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interest in the money. *Martin de Puech* and Co. had an interest that it might be applied in discharge of their acceptances. The house of *Power* and *Warwick* had a similar interest, in order that they might be relieved from their liability as drawers, and they had also an interest in any surplus. The *French* Court decreed, that the proceeds should be applied so as to have the effect of relieving the house of *Martin de Puech* and Co. pro tanto from their liability as acceptors, and that of the bankrupts from their liability as drawers. The question, then, is, to whom the money belonged which they directed to be so applied. It seems to me, that it was the joint money of *Martin de Puech* and Co. and the bankrupts, neither of those houses individually having any control over it in conscience or justice. The money was applied in the manner decreed by the *French* Court; and, therefore, had the effect of relieving *Martin de Puech* and Co. from their obligation as acceptors to the extent of the payment. If they had understood that, by the *English* law, this money would be considered as the money of *Power* and *Warwick*, they might, for their own protection, have insisted that it should be paid into their own hands, in order that they might themselves pay it over to the defendants, and thereby exonerate themselves from all responsibility. They might then have paid it as their own money, and the assignees could have had no claims against the defendants for receiving it. Now, it seems to me, that the payment under the decree of the *French* Court was, to all intents and purposes, the same thing as if it had been made by the hands of *Martin de Puech* and Co.. If it was not, the legal consequence would be, that the defendants would be liable to refund the

money

money to the assignees, and *Power* and *Warwick* would then have the whole benefit of the money which had been standing in the bank for the security of *Martin de Puech* and Co., and the latter would be liable on their acceptances. That would be most unjust. I am of opinion, that by our law the assignees are not entitled to claim this money ; because, when it was paid to the defendants, it was not the money of the bankrupts, *Martin de Puech* and Co. having an interest in having it applied in discharge of the bills which they had accepted. It is, therefore, to be considered in substance as if it had been paid by them : and, if so, the assignees have no claim. I think, therefore, that there must be judgment for the defendants.

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against
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HOLROYD J. Notwithstanding the able argument addressed to the Court on the part of the plaintiffs, no doubt has been raised in my mind with regard to the point in question. I take it to be quite clear that the plaintiff, as assignees, cannot recover the money now sued for, unless the bankrupts themselves, in case there had been no bankruptcy, could have recovered it as money had and received by the defendants to their use. Now, I am of opinion, if there had been no bankruptcy, that the bankrupts could not have maintained an action against the defendants for money had and received to their use on the ground of this being money to which they, the bankrupts, were entitled. The bills were accepted on the faith of those bank shares in the *French* funds, which were bought by *Martin de Puech* and Co. They had more than a simple lien on it ; it was in law their property, and vested in them ; in trust, indeed, for the bankrupts, after satisfying their

own

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own lien. Where a person has a simple lien on goods, he cannot sell and dispose of them ; but if he has a special property in those goods, in trust for another, subject to a claim of his own, in such case the party may sell, in order to repay himself. The bills having been accepted, *Martin de Puech* and Co. were, in the first instance, liable to pay them. If they had paid them, they would have had a right to have sold the shares to reimburse themselves. An attachment was lodged in the *French* court, and *Martin de Puech* and Co. were parties to it, for a decree is made in their favour, as to that part of the property appropriated to pay them, previous to any application of any part of it to the payment of these bills. Suppose there had been no bankruptcy, would the bankrupt have been entitled to any of the proceeds of those shares in the *French* funds, while the bills were outstanding ? I think not. *Martin de Puech* and Co. had the legal property in them, for they were the only persons who could sell or dispose of that property. If the bills, indeed, had been paid by the bankrupts, they would have had an equitable interest in the bank shares. But if *Martin de Puech* and Co. had sold the shares, the bankrupts could not have got the money out of their hands until they had reimbursed them to the amount of their acceptances. Nor can they, now that *Martin de Puech* and Co. have been compelled by the decree of the *French* Court to pay the money to the holders of the bills, recover the same from the defendants; because it was not their money until the bills had been provided for; that not having been done, I am of opinion, that they had neither the legal nor equitable property in the proceeds. It is said, however, that by the statute of *James*, the property cannot be attached

as

as the debt of the bankrupt. If the bankrupts had been the only debtors, and the property had been attached, that would have come within the statute; but here the property that is attached was in law, though a trust, in some respects the property of *Martin de Puech* and Co. They were debtors as well as the bankrupts. For they were indebted as acceptors to the holders of the bill; and it is for the satisfaction of that debt, due on the bills, and not the debt of the bankrupt merely, that this property is attached. I think that the bank shares might be attached as the debt of *Martin de Puech* and Co., and the decree being that the proceeds should be applied towards the retiring of those bills, it is to be considered exactly the same as if the Court had ordered the money to be paid to *Martin de Puech* and Co., that they might pay those bills, and they had so paid them in compliance with that order. At all events, I think that the assignees cannot say that this is their money till they themselves have paid these bills. For these reasons, I think that there ought to be judgment for the defendant.

BEST J. This case has been argued, not only with great ingenuity, but put on its only tenable ground. It must be considered, as if both *Power* and *Warwick* and *Martin de Puech* and Co. were solvent, and then it would stand thus: *Power* and *Warwick* draw on *Martin de Puech* and Co. in *France*, certain bills of exchange, and the latter accept those bills, on the express condition that they are to hold certain bank shares which stood in their names; so that, in *France*, they were the actual legal proprietors of the shares, and they were to retain them, in satisfaction of the debt to which they rendered themselves liable by their acceptances.

Now

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Now these bills, so drawn, get into the hands of the defendants, who present them to *Martin de Puech* and Co. in *Paris*. Suppose the latter had not become insolvent, and the defendants had proceeded to get these bank shares by attachment, out of the hands of *Martin de Puech* and Co., the answer would be this: " You cannot attach this property, it is not the absolute property of the drawers, but it is our property; it is in our possession, it is clothed with certain rights which belong to us; until those claims are satisfied, you cannot take it out of our hands." And in a court of law it could not have been taken out of their hands. It would be necessary, in this country, to have gone into a court of equity to have ascertained those rights. The *French* Court has disposed of it as a court of equity would have disposed of it in this country. On the defendants in this action attaching the property in *France*, the Court calls on all the parties interested, as a court of equity would do. They give notice to Mr. *De Tastet* and the assignees of the bankrupt, with a view of bringing all the parties concerned before the Court. If they did not choose to appear before the Court, it is not the fault of the Judges. When the case comes before them, how do they dispose of it? Why, possessing legal and equitable jurisdiction, they decide that this property is not the absolute property of the drawers of the bills in *England*, but is property in which they had little interest, being mortgaged to *French* subjects to the extent of its value; and, indeed, on the sale of the property, it does not produce enough to pay the *French* mortgagees, the latter having rendered themselves responsible to the defendants in this action, by the acceptance of those bills of exchange. The Court directs, therefore,

that

that the proceeds should be disposed of in first protecting *Martin de Puech* and Co., in retiring the bills; that is, they did the same thing as if they had directed the money to be paid over to the *French* houses, in order that they might hand it over to the holders. That was a just and equitable decision, and such as a court of equity would have pronounced in this country. Then, this money has been paid by *Martin de Puech* and Co. and not by the bankrupts. It cannot be considered in the hands of the defendants as money which has been received on account of the bankrupts, but as money received on account of *Martin de Puech* and Co.; and the defendants have received it, on condition of giving up their claim against *Martin de Puech* and Co. The whole fallacy of the argument consists in considering this as the money of the bankrupts; whereas, as between them and *Martin de Puech* and Co., it was clearly the money of the latter; for the shares were purchased in their own names, and they were suffered to continue in possession of them, so as to enable them to protect themselves against the legal consequences of their acceptances. Upon these grounds, I am of opinion that there ought to be judgment of nonsuit.

Judgment of nonsuit.

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CLARIDGE against EVELYN and Others.

Saturday,
October 27th.

THIS was an action upon the case, brought by the plaintiff against the defendants, as commissioners of a Court of Requests, established by an act of the

An infant can-
not be ap-
pointed to the
office of clerk
of a Court of
Requests,

where it is part of the duty of that officer to receive the money of the suitors.

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CLARIDGE
against
EVELYN.

48 G. 3., for a false return to a writ of mandamus. The declaration stated that the plaintiff had been duly elected to the office of clerk of the said Court of Requests, but had been unjustly refused admittance to the office by the defendants, the commissioners of the Court; that the plaintiff had obtained and prosecuted a writ of mandamus, directed to the commissioners, commanding them that they should admit the plaintiff into the office of clerk, or that they should shew cause to the contrary, which writ had been duly delivered to the defendants; yet that the commissioners had not admitted the plaintiff to the office, but had falsely and maliciously returned, in answer to the said writ, "that the office of the clerk of the commissioners of the Court of Requests aforesaid having become vacant by the death of one *Richard Crow*, then late clerk, *T. K. Crow* was duly elected clerk of the said Court by the major part of the commissioners, and had been since duly admitted into the office; and that the plaintiff never was elected to the office of clerk of the Court of Requests, as by the writ was suggested." The declaration, after negativing the facts in the return, stated that the plaintiff, by reason of the false return, had been deprived of the gains and profits which he would have derived by exercise of the office, to his damage of 500*l.* Plea, general issue. At the trial before *Abbott C. J.*, at the *Guildhall* sittings after *Michaelmas* term, 1819, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case.

By the death of the late *Richard Crow*, on the 8th of December, 1818, the office of clerk of the Court of Requests, constituted by the act of parliament mentioned in the declaration, became vacant. On the 8th day

day of *January*, 1819, the commissioners of the Court, at a meeting duly summoned and held according to the directions of the act, proceeded to the election of a clerk in the room of *Crow*. The plaintiff, and one *T. K. Crow*, were the candidates for the office. After the commissioners were assembled, and immediately before the election commenced, *T. K. Crow*, in the hearing of the commissioners, was asked his age by *Richard Allmett*, which question he declined answering: and thereupon *Richard Allmett*, one of the acting commissioners, notified to the rest that *T. K. Crow* was an infant under the age of 21 years, and on that account ineligible to the office of clerk; and that if any commissioner should, after that, give his vote for the said *T. K. Crow*, such vote would be thrown away and void. At the election, each of the commissioners, as he came up to vote, was separately asked by the said *Richard Allmett* for whom he voted; and the said *Richard Allmett*, in the hearing of each of the commissioners, publicly protested against each of the votes for the said *T. K. Crow* immediately on its being tendered, and before the same was taken down or recorded, on the ground of the deficiency of the said *T. K. Crow*. At the close of the poll, the numbers were, for *T. K. Crow*, 87; *G. Claridge*, 44; *T. K. Crow* was, therefore, immediately after the election, declared by the commissioners to be elected by them as such clerk, and was returned as such clerk, and admitted to the office, and has hitherto continued to serve and act as clerk. *T. K. Crow*, at the time of the election, was an infant under the age of 21 years, and, at that time, under articles of clerkship to *Richard Crow*, having attained the age of 20 on the 28th day of

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December, 1818; but he had, for about two years, occasionally acted for *Richard Crow* in his office of clerk of the Court of Requests, but without any appointment pursuant to the provisions of the act of parliament. The question for the opinion of the Court was, whether the said *T. K. Crow* was duly elected to the said office.

Tindal, for the plaintiff. If an infant be not eligible to this office, due notice having been given to the electors at the time of the election, the votes so given to that infant were thrown away. Whether an infant be eligible to the office in question, must depend upon the duties imposed upon the officer by law. Now, by the 48 G. 3. c. 50., by which this court was established, the commissioners are authorised to appoint one or more fit persons for each of the offices of clerk and beadle; and the person appointed is authorised to execute the office of clerk, immediately after his or their appointment, and from time to time to appoint a deputy or deputies, to act in his or their names or stead, in case of sickness, or other sufficient cause to be allowed by the commissioners, but not otherwise. By a subsequent clause, p. 17., the clerk is directed, at the prayer of the party prosecuting, to issue a precept, by way of ca. sa. or fi. fa.; and in p. 20., the clerk is directed to indorse the sum of money and costs, to be levied on the precept, to be issued upon execution awarded against the body or goods of any person; and if the party against whom such execution shall be awarded, shall, before any actual sale of the goods or his imprisonment, pay unto the clerk for the time being such sum of money and costs, then the execution shall be superseded, and the body, goods,

goods, and chattels of the party set at large; and in p. 23., amongst the fees which the clerk is entitled to take, is one for paying money into court in full, and entering the same in his book. It appears, therefore, to be part of the duty of the clerk to receive the money of the suitors, for whom he is a mere trustee, and to whom he ought to be responsible. An infant, however, would not be liable in an action for money had and received. In *Co. Litt.* 172. a., it is expressly laid down, that an infant cannot be receiver, for he has no skill to render an account. An infant, indeed, cannot contract, except for necessaries; and therefore, in *Whywall v. Champion* (a), it was held, that if an infant be a mercer, and buy goods and wares for his shop, the contract is not binding upon him. Besides, this was an office which required skill and ability, and on that ground it has been decided, that an infant cannot be a mayor of a corporation, nor elected a burgess (b); *Rex v. White*. (c) The circumstance of the clerk being allowed by this act of parliament to appoint a deputy, with the approbation of the commissioners, can make no difference, for no action is given against the deputy, and therefore the rule of respondeat superior, applies; and the right of action would only be against the clerk.

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against
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Chitty, contrà. An infant may contract for his own benefit, and, by analogy, he ought to be entitled to hold an office which is for his benefit; and in *Bristow v. Eastman* (d) it was held, by Lord Kenyon, that money had and received would lie against an infant for money em-

(a) *Sir.* 1085.(b) *Comyn's Digest*, tit. *Infant*, C. 1.(c) *Selwyn*, N. P. 9th edit. 1043. *Mandamus*.(d) *Peake*, N. P. C. 223.

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against
EVANS.

bezzled by him. In *Young v. Fowler* (*a*), it was held, that a grant by the bishop of the office of register of a diocese in reversion after the death of the tenant for life, to an infant eleven years of age, exercendum per se vel deputatum sufficientem, is good, notwithstanding the infancy. Now here this office may be exercised by deputy, and therefore that case is in point.

ABBOTT C. J. No authority has been cited to shew that the grant of an office of public and pecuniary trust to an infant is valid. It is true, that the offices of sheriff and of jailor have been granted in fee, and that such grants are not void, on the ground that those offices may by descent vest in an infant. In those cases, however, the grantees have the power of appointing deputies. In the case of *Young v. Fowler*, where a grant by the bishop of the office of register of a diocese to an infant was held good, the grant was in reversion, and the grantee attained full age before the office descended to him. Besides, the duties of that office are not stated in the report of the case. Looking at this act of parliament, it appears that this is an office of pecuniary trust, and it seems to me, therefore, impossible to allow the grant of such an office to an infant, for in the event of his being guilty of negligence, with respect to the monies placed in his hands, the suitors of the court might be deprived of that remedy which they ought to have against a public officer entrusted with their money. If, on the other hand, he were to conduct himself so as to be criminally liable, he would be placed in a situation of peril, which the law is anxious he should avoid. I am of opinion, therefore, that he was ineligible to this office; and due notice of his incapacity having

(*a*) *Cro. Car. 555,*

been

been given to the electors at the time of their election, their votes were thrown away, and, consequently, there must be judgment for the plaintiff.

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against
EYRE,

BAYLEY J. I am of the same opinion. The commissioners are bound to appoint a fit and proper person. Now, a person who is not legally responsible for the discharge of the duties of the office, cannot, in point of law, be considered a proper person to execute it. The clerk, in this case, is to have the money of the suitors entrusted to his care; he ought, therefore, to be civilly answerable for that money, either if misapplied by himself, or lost by the negligence of his deputy. Possibly he might be liable for a tortious conversion of the money by himself; but he would not be so liable where the money was lost either by his own negligence or that of his deputy; and therefore the public, by the appointment of an infant to the office, would lose that privilege which the law gives them against the principal. I am, therefore, of opinion that an infant was not eligible to this office; and, consequently, that there must be judgment for the plaintiff.

HOLROYD J. I am of opinion that this is an office which an infant cannot legally hold. The officer is to receive the money, which is paid into court. The act of parliament puts a special trust and confidence in him in that respect; and that being so, I am of opinion that, independently of the provisions of the act, he could not legally appoint a deputy. In *Comyn's Digest*, tit. *Officer*, D. 2., it is laid down that a deputy cannot be appointed to an office, if the grant imports a trust or confidence in the person; as, to be squire to the king's body, if a deputy is not allowed by his patent, and for

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against
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that the *Year Book*, 11 *Edw. 4.* l. is cited. Now, by the provisions of this act of parliament, it depends entirely on the discretion of the commissioners, whether they will, in any case, allow a deputy to be appointed; and they may insist that the office shall be executed by the party in person. I think, therefore, the case must be considered as if the office was to be executed by the infant in person. Besides, as the law will not allow an infant to act upon his own discretion, so as to be civilly responsible for his own acts, it will not allow him to be responsible for the acts of others; and, therefore, if he could appoint a deputy, he would not be liable for his acts; and if he is not responsible, he is not a fit person to be put in trust for others; for the public, who paid money to him, would be in a worse situation than if the office was filled by a person of full age, who might be sued. I am, therefore, clearly of opinion that an infant is not a competent person to execute the special trust reposed in the officer by this act of parliament; and, consequently, there must be judgment for the plaintiff.

Judgment for the plaintiff. (a)

(a) *Best J.* absent at Chambers,

*Saturday,
October 27th.*

**HODGSON and Others, Assignees of SEATON and
Others, against GASCOIGNE.**

The growing crops of a tenant having been seized under a *fl. fa.*, a writ of *hab. fac. poss.* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of the *fl. fa.*: Held, that the sheriff was not bound to sell the growing crops under the *fl. fa.*, inasmuch as they could not, in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: Held, also, that the sheriff had no right to allow to the landlord a year's rent, under the stat. of 8 *Ann. c. 14.*, that statute contemplating an existing tenancy, which, in this case, must be taken to have ceased on the day of the demise in the ejectment,

omittas

omittas fi. fa. issued at the suit of the plaintiffs against one *Charles Smith*, and for making a false return to the writ. Plea, general issue. The cause was tried at the York Summer assizes, 1817, before *Wood B.*, when the jury found a verdict for the plaintiffs for 5000*l.* damages, subject to the opinion of the Court upon the following case.

The plaintiffs, as assignees of the estate and effects of *J. Seaton* and others, recovered a judgment in *Trinity* term, 1815, against *Smith*, for 20,000*l.* debt, and 80*s.* costs; and on the 14th of *June*, 1816, caused to be issued thereon a writ of non omittas fi. fa. against *Smith*, directed to the sheriff of *Yorkshire*, indorsed to levy 5446*l.* 18*s.* 5*d.* On the 1st of *July*, 1816, the writ was delivered to the defendant, as sheriff of the county, who granted his warrant, directed to one *Foster*, his bailiff, to execute the same. On the same day, the warrant was delivered to *Foster*, who, on the 2d of *July*, entered into a mansion-house, farm, and colliery, then in the occupation of *Smith*, called *Barrowby Hall*, and seized the furniture, stock, crops, colliery, engines and utensils, and other effects found or growing, or being upon the said farm. On the 9th day of *July*, 1816, while in possession of the property, *Foster* received from one *J. Clayton*, as agent for the defendant, a notice demanding 886*l.* 5*s.*, being one year's rent due to the defendant from *Smith*, for the mansion-house, farm, lands, and coal-mines of *Barrowby* aforesaid. The defendant was the owner of these premises; and by indenture of the 13th *February*, 1813, demised the same to *Smith*, habendum, for 21 years, at the yearly rent of 850*l.* and 100*l.* for the colliery, with a proviso for re-entry, on non-payment of rent. In *Michaelmas vacation*,

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against
Gascoigne.

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*Hodgson
against
Gascoigne.*

vacation, 1815, there being then two years and a half in arrear, a declaration in ejectment was delivered on the two several demises of the defendant and of *R. Oliver* Esq., which demises were laid on the 5th *December*, 1815, and judgment was obtained on the 1st *July*, 1816. On the 15th *July*, 1816, *J. Clayton*, as attorney for the defendant, delivered to *Foster* a warrant, dated 10th *July*, 1816, made by the defendant, as sheriff of the said county, and directed to the chief bailiff of the liberty of the *Honour of Pontefract*, and his deputies (*Foster* being also one of such deputies), upon a writ of possession issued in the cause on the 1st of *July*, 1816, against *Smith*, to recover the defendant's and *R. Oliver's* term to come in the premises. *Foster*, having received the two warrants, sold the furniture, stock and colliery, engines and utensils on the farm on the 18th of *August*, 1816, but refused to sell any of the crops then growing and unsevered thereon, which were of considerable value; and immediately afterwards delivered up possession of the farm and premises to the defendant, with the crops then growing thereon, in pursuance of the warrant issued on the writ of possession. On the 13th *September*, 1816, *Foster* paid to the land agent of the defendant 886*l.* 5*s.* for one year's rent, due to the defendant from *Smith*, on the 13th *February*, 1816, for the farm and premises. The defendant afterwards, as sheriff, returned to the writ of *fi. fa.*, that he had caused to be levied of the goods and chattels of the said *Smith* to the value of 1125*l.* 19*s.*, which money he had ready to render to the plaintiffs; and further certified, that the said *Smith* had not any other goods or chattels in his bailiwick, wherof he could cause to be levied the residue

residue of the said debt and damages, or any part thereof.

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against
GASCOIGNE.

Tindal, for the plaintiff. There are two questions in this case: first, whether the sheriff ought not to have sold the growing corn, notwithstanding the subsequent delivery of the writ of possession; and, secondly, whether he ought to have allowed the landlord the year's rent, under the statute of 8 Ann. c. 14. Now, the effect of the seizure was to vest in the sheriff the property in the things seized, from the time of the delivery of the writ of execution. On the 1st of July, therefore, the property in the corn was divested out of the tenant, and vested in the sheriff, for the purpose of levying the debt; and this case must be considered as if the judgment had been obtained, and the writ had issued at the suit of another landlord. Now, the delivery of a writ of hab. fac. poss., subsequent to the delivery of the fi. fa., will not divest the right of property in the corn growing, which was already in the sheriff. The judgment in ejectment is, that the plaintiff recover his term against the defendant, of and in the premises aforesaid. The writ orders the sheriff quod habere facias, possessionem. This can only bind from the time of the execution of the writ, for in an action for mesne profits, the course is to give damages up to the time of the execution of the writ. It cannot have any retrospective power, so as to take away any right vested in a purchaser of the crops. Suppose for example, the tenant had sold the crops to a purchaser, and after the sale, the sheriff entered under the habere facias possessionem, would the landlord in that case have been entitled to the growing crops. [Bayley J. I think that he would, if the sale took place subsequently

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against
GASCOIGNE

sequently to the day of the demise laid in the declaration in ejectment. For, from that time, the tenant must be considered as a wrong doer.] The tenant certainly must be taken to be a wrongdoer from the 5th day of *December*, 1815. The statute of frauds, however, enacts that no fieri facias, or other writ of execution, shall bind the property of goods, but from the time that such writ shall be delivered to the sheriff to be executed. An hab. fac. poss. is a writ of execution, and therefore it could only bind the property from the time of its delivery.

ABBOTT C. J. The property in the growing corn, in fact was not vested in the tenant at the time of the seizure, for after the judgment was obtained in ejectment, the defendant is to be considered, in point of law, as a trespasser from the day of the demise laid in the declaration. From that time, therefore, the property was divested out of him, and he had no property at the time when the fieri facias was delivered to the sheriff. The landlord, in an action for mesne profits, might have recovered the value of all the crops.

Tindal. If that be so, the defendant has no right to the year's rent, for the lease determined on the 5th *December*, 1815, as he maintains by his ejectment. The **8 Anne, c. 14.** evidently contemplates an existing tenancy at the time of the execution, for the words of the statute are, "that no goods lying or being upon any messuage, land, or tenement, which are, or shall be leased for lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, &c." The object of the act was, to make the landlord amends for

taking

taking away his power of distress, but here he could have no distress, because there was no tenancy, and the plaintiff contends that the defendant was a trespasser, from the day of the demise laid in the declaration in ejectment.

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against
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Littledale, for the defendant, admitted that he could not claim to have the year's rent allowed; upon which

The *Court* ordered the verdict to be entered for the plaintiff for 886*l.*

Judgment for the Plaintiff.

HARDCASTLE *against* NETHERWOOD.

Saturday,
October 27th.

THE plaintiff declared, that whereas defendant, on, &c., at, &c., in consideration that plaintiff, for the accommodation and at the request of defendant, would accept certain bills of exchange, drawn by defendant upon plaintiff, for 10,455*l.*, and would deliver the bills so accepted to defendant, in order that defendant might negotiate the same for his own benefit, defendant undertook, &c. to provide money for the payment of the said bills when the same became due, and to indemnify plaintiff from any loss or damage by reason of the acceptance of the bills. Averment, that plaintiff did accept the bills, and deliver them so accepted to de-

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 order that he
 might negoti-
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 his own benefit.
 Defendant un-
 dertook to pro-
 vide money for
 the payment of

the said bills, as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof. Breach, that defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expences: Held, upon demurrer, that, as plaintiff might be entitled upon this declar- ation to recover special damage, a set-off was not a good plea.

fendant,

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against
NETHERWOOD.

fendant, for the purpose aforesaid. And that, although the said bills were negotiated by defendant for his own benefit, and the same have long since become due, yet defendant did not provide money for the payment of the said bills when the same became due, nor indemnify plaintiff from damage by reason of his acceptance of the bills, but refused so to do; by reason of which premises, plaintiff, as such acceptor of the said bills, was called upon *and forced and obliged* to pay, and did then and there necessarily pay to the respective holders of the bills, divers large sums of money, together with certain interest, charges, or expences thereon, amounting in the whole to a large sum of money, to wit, 100*l.*, and by means thereof the said plaintiff is damnified to the amount thereof. Defendant pleaded the general issue, and *actio non accredit infra sex annos*, and also a plea of set-off. The plaintiff demurred generally to the plea of set-off, and the defendant joined in demurrer.

Manning, for the plaintiff, referred to the case of *Auber v. Lewis* (*a*), as deciding that to a declaration on a contract, upon which the plaintiff might have sued for unliquidated damages, a set-off could not be pleaded. Upon which the Court called upon

Littledale, for the defendant, who argued that the demand sought to be recovered by the first count was simply a debt, for which the defendant might have been held to bail, without a judge's order, and which might be proved under a commission of bankrupt. Sed

(a) E. T. 1818, K. B. *Manning's Nisi Prius Digest*, 2d ed. p. 251.

Per Curiam. This case cannot be distinguished from that which has been cited. The Court must look to the contract declared on, and if that is such as might entitle the party to recover special damages, the statutes of set-off do not apply, although no special damage be alleged. Here, however, the jury might possibly give damages for the manner in which plaintiff had been forced and compelled to pay the amount of the bills. The defendant might, perhaps, have pleaded a set-off to that part of the count which charges the defendant with the amount of the acceptances paid by the plaintiff.

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Judgment for the Plaintiff.

HARLEY and Another *against* GREENWOOD.

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ACTION against the defendant, as the acceptor of four bills of exchange. Plea, that before the defendant became bankrupt, and before the making of the promises in the declaration mentioned, he was indebted to the plaintiffs in divers large sums of money, amounting to 150*l.* for goods sold, and that for securing to

Declaration
 upon four bills
 of exchange.
 Plea in bar,
 that defendant
 was indebted
 to plaintiffs in
 divers large
 sums of money
 for goods sold ;
 and that, for
 securing to

plaintiffs the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange drawn by the plaintiffs, for and in payment of one of the said several sums of money in which he was so indebted as aforesaid ; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums of money in which he so stood indebted as aforesaid. The plea then stated that defendant had duly become bankrupt ; and that the bills of exchange mentioned in the declaration were proveable under the commission ; and that the plaintiffs, being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration : Held, upon demurrer, that this plea could not be supported ; first, because the proof of a debt under the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt ; secondly, that the election of the creditor to take the benefit of the commission, is confined by the 49 G. 3. c. 121. s. 14. to the debt actually proved, and does not extend to distinct debts ejusdem generis due at the same time.

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the plaintiffs the payment of the said several sums of money, which so amounted to 150*l.* before his bankruptcy, he accepted a bill of exchange for 47*l.*, drawn by the plaintiffs on the defendant, and payable three months after date, which bill was accepted by him in payment of one of the said several sums of money in whch he was indebted as aforesaid. The plea then stated, that he had similarly accepted each of the several bills of exchange, for which the action was brought in payment of one other of the said several sums of money in which he so stood indebted as aforesaid, and so in the whole amounting to 150*l.* It then stated, that at the time he became bankrupt, and at the time of the commencement of the suit, he was not indebted to the plaintiffs in any further sum of money, than the said several sums, so amounting to 150*l.*, and in payment of which he had accepted the said several bills, and that the promises in the declaration were made by him, upon, for, and in respect of all the several sums of money in which he was so indebted to the plaintiffs, except the sum of 47*l.* The plea then stated the trading of the defendant, the petitioning creditor's debt, and that he became bankrupt, the issuing of the commission, &c. It also stated, that the bills of exchange, and the debts and sums in the declaration mentioned were proveable under the commission, and that, after the passing of the act of the 49 G. 3., the plaintiffs being creditors of the defendant for the said sum of 150*l.*, and for payment of which, the bills of exchange in the plea mentioned were given, the plaintiffs proved the sum of 47*l.*, parcel of the sum of 150*l.*, under the commission, as a debt due from the defendant to the plaintiffs, and

thereby

thereby made their election to take the benefit of the commission, not only with respect to the said debt so proved, but also, as to the bills of exchange mentioned in the declaration, and to the debts and money due to them by virtue of the promises in the declaration. The second plea stated, that the defendant, before he became bankrupt, was indebted to the plaintiffs in a large sum of money, besides the money due and owing from him to them, by virtue of the promises mentioned in the declaration, to wit, the sum of 47*l.* for goods sold, and that the bills of exchange, and debts, and sums of money in the declaration, mentioned at the time of the proof, were proveable, and could, and might be proved under the commission. The plea, then, after pleading the bankruptcy, &c. as in the last plea stated, that afterwards, and whilst the several bills of exchange, debts, and sums of money were proveable under the commission, the plaintiffs being creditors of the said *G. Greenwood* the defendant, as well for the money due and owing to them, by virtue of the promises and undertakings in the declaration mentioned, as for the said sum of 47*l.*, proved the latter sum under the commission, as for a debt due from the defendant to the plaintiff, and thereby made their election, &c. To these pleas the plaintiff demurred. The case was now argued by

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F. Pollock, in support of the demurrer. The 49 G.S. c. 121. s. 14. enacts, that the proving of a debt shall be deemed an election, to take the benefit of the commission, with respect to the debt so proved. Now the debt proved in this case, was a debt of 47*l.* upon one bill of exchange, and this action is brought to recover sums of money secured by four other bills of exchange. Upon the

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words of this part of the section of the statute, which applies to the case where the creditor first proved his debt, the election of the creditor to take the benefit of the commission, is confined to the debt actually proved, and this Court put that construction upon the statute in the case of *Watson v. Medex* (*a*), which is precisely in point.

Marryat, contrà. The first part of this section of the statute enacts, "that it shall not be lawful for any creditor who has brought any action against the bankrupt, in respect of a demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission without relinquishing such action." Under that part of the clause, therefore, a creditor for several sums cannot prove a debt in respect of one of them, without relinquishing any action he may have brought in respect of the others. The statute then proceeds in the same sentence to say, that "the so proving or claiming a debt under the commission shall be deemed an election to take the benefit of such commission with respect to the debt so proved." Now the whole of this clause should be construed together, with reference to the law as it stood before the passing of the act, and the mischief intended to be remedied. Before the statute, a creditor was not permitted both to come in under the commission, and to proceed at law at the same time for one and the same debt, though he had different securities for it, or to split a demand for that purpose. If a creditor first proved his debt, and afterwards pro-

(*a*) 1 B. & A. 121.

ceeded

ceeded at law, although the Lord Chancellor could not directly restrain him from pursuing his legal remedy, yet he put him to his election, and if he elected to abide by his remedy at law, he was discharged as a creditor under the commission. The object of this section of the statute is, to give the bankrupt the same remedy by way of defence at law, as he formerly had upon petition to the Chancellor. Now, if the present case had occurred before the statute, the plaintiffs would not have been permitted to take the benefit of the commission with respect to the 47*l.*, and to have their remedy at law for the other sums of money, for which they have different securities, but which compose one entire debt. It could never have been the intention of the legislature, to make the right of the creditor to proceed both at law and under the commission, depend upon the accidental circumstance of the priority of the action or the proof. In *Ex parte Dickson* (a) the bankrupt had given to a creditor two bills of exchange, one for 100*l.*, and the other for 92*l.* The creditor parted with the latter bill, and brought an action on the former; and took the bankrupt in execution. The 92*l.* bill was afterwards returned to him dishonoured, and he took it up and proved it under the commission. An application was made by the bankrupt to be discharged out of execution, on the ground that such proof was an election to relinquish the action, and to come in under the commission. The Lord Chancellor said, that the act was a remedial law, and must receive a liberal construction, and he made the order on the creditor without prejudice to his proving under the commission. In that case, the credi-

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(a) 1 Rose, B. C. 98.

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tor had brought his action for one debt before he made his proof in respect of the other. It is an authority, therefore, to shew, that a creditor proving for one debt, thereby makes his election to take the benefit of the commission with respect to all the others. In *Ex parte Hardenburg (a)*, the Lord Chancellor was of opinion, that a creditor who had not proved, but who had presented a petition, impeaching the commission, and praying that it might be superseded, and that he might be permitted to prove, had made his election to take the benefit of the commission with respect to a debt upon which he had proceeded at law, and taken the bankrupt in execution, and the bankrupt was discharged out of custody. The case of *Watson v. Medex* is not exactly in point with the present. The plaintiff there, at the time of making his proof for the first parcel of the goods, the bill for which he then held, was not the holder of the bill for the second parcel; for he had negotiated that bill, and it was not returned to him until after the proof. In this case, the last plea alleges the plaintiff to have been the creditor for the whole sum at the time he proved a part, and that he was the holder of all the bills at the time he proved one. The debts are all of the same nature, viz. for goods sold, though they are secured by distinct instruments. Taking the whole of the clause together, and considering it with reference to the mischief thereby intended to be remedied, the true construction is, that the creditor should not be allowed to come in under the commission, and to proceed at law at the same time, for one and the same debt, though he has different securities for it.

(a) 1 Rose, B. C. 204.

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BAYLEY J. (a) There are two questions raised by the pleadings in this case. The first is, whether a creditor for different sums of money, accruing due in respect of debts *eiusdem generis* (either in respect of several bills of exchange or of several parcels of goods sold,) by proving under the commission for any one of the sums, destroys his remedy at law in respect of the rest. The other question is, whether proof of a debt under a commission of bankruptcy is, even as to the debt so proved, a bar at law in any case. If it be a bar at law, it must become so by the positive enactment of the statute. The 49 G. 3. c. 121. s. 14. enacts, "that it shall not be lawful for any creditor who has brought any action against the bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission, &c., without relinquishing such action." If the creditor, therefore, had brought any action, he could not seek any remedy under the commission, either in respect of the debt which was the subject of the action, or of any other demand whatever, without entirely abandoning the action. The act then goes on to say, "that the proving or claiming a debt under such commission, shall be deemed an election by the creditor to take the benefit of the commission with respect to the *debt* so proved or claimed." The question, then, is, is the proving of the debt a bar to the action in any case? Now, the commencing of an action in one court does not destroy the right of the party to commence an action for the same debt in another court. The defendant may, indeed, plead in abatement the pendency of the former action; but he cannot plead it

(a) Abbott C. J. was absent at the *Old Bailey* when this case was argued.

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in bar. The statute in this case does not, in express terms, say that the proving of a debt shall be a bar; and there seem to me to be very strong reasons why it should not be so. Suppose, for example, a creditor to have proved a debt under the commission which is afterwards superseded; it would be most unjust that he should be barred of his remedy at law in consequence of his having so proved his debt. It has been said, however, that the creditor ought to be restrained from commencing his action until the commission is actually superseded. That, however, might be very injurious to him; for his debt might, in the interim, be barred by the statute of limitations. If, for example, the creditor proves a debt under the commission which had been contracted upwards of five years, and the commission is not superseded till the six years expire, he might be barred of all remedy. These inconveniences would arise, if we were to hold that the mere proving of a debt should operate as a perpetual bar. Now, the words of the statute will be satisfied, and a very beneficial remedy given to the creditor, if we hold that, where a creditor has proved his debts, and afterwards brings an action, the bankrupt may, under this act, apply to the Chancellor to expunge the debt, or to the court in which the action is brought, to stay the proceedings. The latter was the course adopted in the case of *Watson v. Medex*. (a) In *Kemp v. Potter* (b), the plaintiff, after he had commenced an action, proved his debt under the commission; the defendant having pleaded bankruptcy, ruled the plaintiff to reply; the plaintiff moved to set aside that rule, with costs, on the ground that the mere proof of the debt under the commission was an

(a) 1 B. & A. 121.

(b) 6 Taur. 549.

election, and that by force of the statute the action was at an end. The Court, however, were of opinion, that the defendant had a right to have some entry on the record to shew that the action was abandoned, and they discharged the rule. It is clear, therefore, that in that case the Court of Common Pleas did not consider the mere proof of the debt to operate as a bar to the action. For these reasons, it seems to me that this statute does not make the proof of the debt under the commission an absolute bar to the remedy at law, but only gives to the bankrupt an opportunity of applying for relief, either to the Court in which the action is brought to stay the proceedings, or to the Chancellor to expunge the debt. But if that were not so, I am of opinion, that the statute does not apply to the present case. The words are, "that the proving or claiming a debt under such commission shall be deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed." Now, the debt so proved in this case was 47*l.* only. The argument is, that as there were many other debts *eiusdem generis* due to the plaintiff at the same time, it must be considered as proof, not only as to the 47*l.*, but as to the whole of the debt due from the defendant to the plaintiff, or, in other words, the proof of parcel of the debt must be considered as proof of the whole; but that is by no means a legitimate conclusion from the premises. The 47*l.* was a distinct debt, due upon one bill of exchange, and the other sums of money were distinct debts, due on the other bills, and the bills themselves were not given for that which had been one entire debt, but in payment of distinct sums of money due for four several parcels of goods; and the debts, therefore, were originally contracted as

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distinct and separate debts. I cannot, therefore, say that the proof of the 47*l.*, which was not originally parcel of one entire debt, and which was not afterwards covered by one entire security, can be considered as any proof of the other debts; and I am, therefore, of opinion, that although the creditor is to be considered as having made an election in respect of the 47*l.*, the debt proved, he is not to be considered as having made an election as to the other distinct debts *eiusdem generis* due at the same time. The judgment, therefore, must be for the plaintiff.

HOLROYD J. I am also of opinion that the plea cannot be supported. The statute 49 G. S. c. 121. s. 14., provides for different cases; the one where an action is brought before the debt is proved, and the other where the debt is proved previously to any action. With respect to the first case, the words are very general, and amount to an absolute prohibition of the proving any debt, until the action is abandoned. According to the literal construction of that part of the clause, therefore, the bringing of an action for one debt will prevent the creditor from proving altogether, though for a distinct debt. With respect to the second case provided for, the statute enacts, "That the proving or claiming a debt under the commission, shall be deemed an election by the creditor, to take the benefit of the commission with respect to the debt so proved or claimed." The words of the statute do not make the proof of a debt an election with respect to separate and distinct debts, but only with respect to the debt actually proved or claimed. In this case, the debt proved was a distinct and separate debt. The words, therefore, of this part of

of the section, do not make the proof of that distinct debt such an election to take the benefit of the commission, as to deprive the plaintiff of his right of action in the present case. I am clearly of opinion that it is no bar to the action; if it were, it would, in some cases, operate as a great hardship upon the creditor; for example, after the proof of his debt, the commission might be superseded, and if he were not allowed to bring any action while the commission was pending, he might be barred by the lapse of time. It might indeed happen, that the debt proved was the only debt due to the creditor himself at the time he made the proof. That was the case in *Ex parte Dickson*. In this very case, the four bills of exchange might have been in the hands of other parties, at the time when the plaintiff proved his debt in respect of the other, and it would certainly be a great hardship upon him, that the proof of the only debt then due to him should bar him of his right of action in respect of debts that afterwards accrued. For these reasons, I am of opinion, that, although if an action be brought after proof of a debt, it may be a ground for a defendant, either to apply to the court in which the action is brought to stay the proceedings, or to the Chancellor to expunge the debt, still the previous proof of the debt cannot be pleaded in bar to the action, and, consequently, that in this case there must be judgment for the plaintiffs.

BEST J. It is unnecessary to decide in the present case, whether the proof of the very debt for which the action is brought, which would have been an election to take the benefit of the commission as to that debt, could have been pleaded in bar. I incline to think that it could not, for, to make it a good bar, the debt must

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be extinguished. Now, here, there was no extinguishment of the debt; for, if the commission had been superseded, the party would clearly have had a right to bring an action. The proper course in such a case for the party to pursue, is either to apply to the Chancellor to expunge the debt, or to the Court in which the action is brought to stay the proceedings. In the latter case, the Court may stay the proceedings only upon the defendant's undertaking not to plead the statute of limitations in case the commission were superseded. I am, however, clearly of opinion, that the facts stated in the plea afford no answer to the present action. The substance of the plea is, not that the plaintiff has proved the debt, but that he has proved another debt, and that that proof is an election to take the benefit of the commission in respect of all the debts then due to him from the bankrupt. The statute only says, that if a party proves a debt, he makes his election as to that debt; and we should go greatly beyond the words of the statute, if we were to hold that he made his election, not only as to that debt, but as to every debt due to him. The instances already mentioned shew, that if that were the law, it might be attended with great injustice. For these reasons, I think there must be judgment for the plaintiffs.

Judgment for the Plaintiffs.

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LAWRENCE against ABERDEIN.

Monday,
October 29th.

ASSUMPSIT upon a policy of insurance. The declaration stated a total loss of the animals insured, by perils of the sea on the voyage. Plea, general issue. At the trial, before *Bast J.*, at the *London* sittings after *Trinity* term, 1820, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case.

The policy was effected on the 30th *December*, 1819. The voyage insured was at and from *Cork* to *Barbadoes* and *St. Vincents*; and at the foot of the policy the insurance was declared to be on thirty mules, ten asses, and thirty oxen, warranted free of mortality and jettison. On the 17th *January*, 1820, the ship sailed with the animals insured, properly stowed on board, on the voyage insured. On the 19th of the same month, a violent storm arose, which caused the ship to labour and pitch. This lasted, without intermission, until the 30th of the same month, when, for the preservation of the ship and cargo, and on account of the damage which the ship had sustained from the violence of the storm, the ship put into *Mount's Bay*, in *Cornwall*, in order to refit. On the first day of the storm, from the violent pitching and rolling of the ship, occasioned by the storm and consequent agitation of the sea, two of the mules, one of the oxen, and five of the asses were killed; the remainder of the animals, from the same causes and perils of the sea, on that and the following days, until the 20th of *January*, received such violent and severe bruises, lacerations, and injuries, that all of them died.

A policy was effected on living animals, warranted free from mortality and jettison. In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed; and others, from the same cause, received such injury that they died before the termination of the voyage insured: Held, that this was a loss by a peril of the sea, for which the underwriters were liable.

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died in consequence thereof, before the ship sailed again in prosecution of her voyage from *Mount's Bay*, which she did on the 14th *February*, 1820, excepting six mules and one ass, one of which six mules afterwards died from the same cause, before the arrival of the ship at *Saint Vincents*. The ship arrived at *Saint Vincents*, with the remaining five mules and one ass, on the 24th *March*, and delivered the rest of her cargo in safety. The question for the opinion of the Court was, whether the plaintiff was entitled to recover for the loss of all or any and which of the animals insured ?

F. Pollock, for the plaintiff. The underwriters are not exempted from the loss that has happened by the word of the special exception, "warranted free from mortality." These words were introduced into the policy by the underwriters, and must therefore be taken most strongly against them. The word mortality signifies death arising from natural causes. Here, the death of the animals arose directly from the violence of the tempest, and not from natural causes. The loss did not therefore arise from mortality, if that word be understood in its ordinary and popular meaning. Some effect will be given to the exception, by construing the word in that sense; for the underwriters will thereby be exempted from one species of loss for which they might otherwise be responsible, viz., in the event of the death of the animals by sea-sickness in a storm. For such a loss the underwriters would be answerable under a common policy. But they would be exempted by the special exception.

Campbell,

Campbell, contra. Some effect must be given to the words of the exception, so as to extend to the underwriters a protection against some species of loss to which they would have been liable, if those words had not been introduced into the policy. Now they would not have been liable for any loss arising from the natural death of animals, but they would have been liable if they had been drowned in a tempest or killed in battle. *Pothier, Traité du Contrat d'Assurance*, c. 1. s. 2. art 2. s. 3., and *Valin, Ordonnances de la Marine*, liv. 3. tit. 6. art 11. Here the animals died in consequence of the injury they received during the storm, and the underwriters, therefore, would have been liable for this loss, under a policy in the common form. The exception, therefore, was introduced for the purpose of exempting them from all losses whatever, arising from the vitality of the subject matter insured, or, in other words, to reduce the risk to the same level as if the subject matter insured was inanimate goods. If that had been the case here, the cargo might have received little or no injury. If the words "free from mortality" be construed only to protect the underwriters against losses arising from death from natural causes, no effect whatever will be given to the exception; for, in such a case, the underwriters would not have been liable under a policy in the common form. The true meaning of the exception is, that the underwriters are to be liable for all the risks to which they would have been subject, if they had insured inanimate goods. By this construction they will still be liable for losses by capture by enemies or pirates, or barratry of the master or mariners.

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ABBOTT C. J. I am of opinion that the underwriters are answerable for this loss. The insurance was on living cattle, which, in the course of the voyage, have been killed by the rolling of the ship in a violent tempest. They have been killed, therefore, by a peril of the sea. Under the general terms of the policy, the underwriters would be answerable. It lies on them, therefore, to shew that there is a special exception in this policy applicable to the present case, in order to relieve them from the effect of their general liability. The expression used in the policy is "free from mortality." Now the word mortality, in its ordinary sense, never means violent death, but death arising from natural causes. There may however, indeed, be a remote cause, which may sometimes superinduce a natural cause. In *Tatham v. Hodgson* (*a*), the want of provisions was the immediate cause of the death of the slaves; the remote cause was the circumstance of the ship having been driven out of her course by the perils of the sea, in consequence of which, the provisions, which otherwise would have been sufficient for the voyage, were exhausted. There was not any exception in the policy in that case. But the statute of the 34 Geo. 3. c. 80. s. 10. had enacted, "that no loss or damage should be recoverable on account of the mortality of slaves, by natural death or ill treatment, or against loss by throwing overboard of slaves, on any account whatsoever." A question was made, whether the death of the slaves so arising, indirectly and remotely from the peril of the sea, was not one for which the underwriters were liable; and the Court held that they were not liable, because it was a loss arising by

(*a*) 6 *Term Rep.* 656.

natural

natural death; and if the ship, in this case, had been driven out of her course by the perils of the sea, and the voyage thereby had become so protracted as to exhaust all the provisions, and, consequently, the means of sustaining the life of the animals insured, I think that the words "warranted free from mortality," introduced into this policy, would have protected the underwriters from that loss for which they otherwise would have been liable, as for a loss arising from the perils of the sea. And if there be any one case, in which effect can be given to those words, understanding them in their ordinary and popular sense, they ought not to be extended beyond that sense. There is very great difficulty, in construing these words, to give a protection to the underwriters against all losses arising from the vitality of the animals. Suppose, for example, a valuable horse, by the motion of a vessel in a storm, were to have his legs broken, but to arrive alive at *Saint Vincents*, the animal would be of no use; the underwriter would be liable for that loss; but if the animal were actually killed, he would not be liable at all. It could hardly be the intention of the underwriter that he should be liable in one of these cases and not in the other. If the construction I have put upon this very ambiguous phrase is not the sense in which it has been generally understood at *Lloyd's Coffee-House*, it will be very easy to introduce into policies other words, which shall more clearly express the meaning of the parties. In this case, therefore, there must be judgment for the plaintiff.

BAYLEY J. My mind has not been free from doubt during the discussion of this subject; but I am now of opinion, that the assured is entitled to recover. Under
a policy

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a policy in the common form, the assured would have been entitled to recover, either in case of the total destruction of the animals, or for any less injury, provided it was occasioned by any of the perils insured against. The words, "warranted free from mortality," are introduced into this policy by the underwriter for his benefit. It is his duty, therefore, to take care to frame his exception in words sufficiently large and extensive to meet all those descriptions of loss against which he intends to protect himself. The word "mortality" may, under certain circumstances, include every description of death, every termination of life to which mortals are subject. It applies generally, however, to that description of death which is not occasioned by violent means. If a great number of the crew, or of animals shipped on board a ship, were killed in the course of an engagement with an enemy, it would not be correct to say that there had been a great mortality among the crew, or among the animals. If, on the other hand, they had come to their death by any natural cause, the term *mortality* would be properly applied to express the cause of such death. If, in this case, the animals insured had died from sea-sickness, occasioned by the agitation of the ship, or in consequence of any other disease, contracted in the course of an unusually protracted voyage, the term mortality might apply to that description of natural death, so superinduced by the voyage. Under a common policy, if the declaration stated, that the ship had met with tempestuous weather, and that the animals thereby became disordered, diseas'd, and died, and it be proved that their death was imputable to the agitation of the ship, occasioned by the tempestuous weather, that would be a loss by a peril of the sea, for which

which the underwriters would be liable. The exception introduced into this policy would, in my opinion, protect them from such a loss. The word "mortality" here used, may, therefore, receive a construction which will afford some protection to the underwriter, without extending it beyond its ordinary and popular sense. If we were to hold, that the exception protected the underwriter from every loss to which the property was subject, in consequence of the subject-matter insured being alive, instead of dead, this absurd consequence would follow, that if by the violent agitation of the sea the animals had their legs broken, and thereby became of no value to the owner, but arrived alive at *St. Vincent's*; the underwriter would be responsible. Whereas, if they had died during the course of the voyage, he would not be liable at all. The circumstance of these words of the exception not being calculated to protect the underwriter from any loss, in the event of the animals receiving any injury short of death, seems to me to shew, that they were not intended to exempt them from a loss by the actual death arising immediately from a peril of the sea. I think that the words used in this exception will protect the underwriter in cases where the death of the animal arises from natural causes remotely produced by some of the perils insured against; but that they will not protect him where such death arises directly from any of the perils insured against. For these reasons, I am of opinion that there must be judgment for the plaintiff.

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LAWRENCE
against
ARMEDEN.

HOLROYD J. I am of the same opinion. Although death may have been the immediate cause of the loss, and may have made the actual loss to the assured

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greater

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greater than it otherwise would have been, still, as the injury to the animals which occasioned their death was caused directly by the violence of the storm, I am of opinion that this is to be considered as a loss by the perils of the sea. It, consequently, falls within the risks enumerated in the policy; and, it seems to me, that it is not excepted out of those perils by the words "warranted free from mortality and jettison." Independently of those words, the underwriters would undoubtedly have been liable as for a loss arising from a peril of the sea. Those words were the language of the underwriters, and were introduced by them to protect themselves from a particular species of loss. By the terms of the policy, they insured against the perils of the sea, &c., and all other losses and misfortunes that should come to the hurt, detriment, and damage of the subject-matter insured. Now, the exception must be considered as ingrafted upon these general words in the policy, and the whole should be read together as one sentence; and then it would stand thus: that the underwriters will be liable for losses by perils of the seas, and all other losses except losses by mortality and jettison. It seems to me, that as the injury which immediately preceded and caused the death of the animals proceeded directly from the violence of the storm, the loss is to be considered a loss by the perils of the sea. Death may or may not have increased the amount of the actual loss to the assured. With respect to the mules and asses, the entire loss arose from the perils of the sea, and was neither increased nor diminished by their death. For, after receiving a mortal wound, they became of no value to the owner, and death consequently did not in any degree increase

increase the loss. The case might be different with respect to the oxen; if they were killed after receiving an injury, their flesh might be of some value as food, and, consequently, their death may have increased the loss in some degree. But still, as the previous injury was occasioned by the perils of the sea, whether the death of the animal did or did not increase the amount of the actual injury to the owner, I am of opinion that it must be considered a loss by the perils of the sea. The circumstance of the parties having inserted in the exception the word *jettison*, satisfies me, that they did not contemplate the case of violent death. For, although it is possible that the animals thrown overboard might, under favourable circumstances, reach the shore and survive, yet I think that the term usually denotes the throwing overboard in a storm, when there would be little probability of animals surviving; and that it must, therefore, mean a jettison whence death ensues. Now, if the term "mortality" were intended to protect the underwriter in every case of the animals meeting with a violent death, the introduction of the word "jettison" would be superfluous, as that species of loss would be covered by the word "mortality." Besides, this absurd consequence would follow; if we were to give to the words used in the exception the construction contended for by the defendant, that where the violence of the wind and waves was so great as to cause the death of the animals during the voyage, the underwriters would not be liable at all; but where the violence of the wind and waves was only such as to cause some injury to the animals, short of death, then the underwriters would be responsible. For these reasons, I am of opinion that the word *mortality*, in this policy, must be understood in its ordinary

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AKERDEIN.*

and popular sense, as importing death arising from natural and not from violent causes. And that being so, there must be judgment for the plaintiff.

BEST J. I am of the same opinion. At the time when this policy was effected, this country was at peace with all the world, and there was not any probability of the vessel being captured by enemies. Capture by pirates on the voyage insured was equally improbable, and a loss by barratry was not very likely to happen. If the underwriters are not liable for the loss in question, they can hardly be liable in any case, for there is not any other species of loss arising from the destruction of the animals, of which death may not be considered the immediate cause. If the ship was even sunk or burnt, death would be the immediate cause of the destruction of the animals, and consequently, according to the construction contended for, such a case would fall within the exception as a loss by mortality. The exception is introduced into the policy by the underwriters. If they had intended to exonerate themselves in every case of death occasioned by a peril of the sea, they should have used words apt and proper to express that intention. They might have stipulated, that they would not be liable for the death of the animals unless the ship were stranded or lost, and then they would not have been liable for the loss that has occurred in this case. They have only stipulated, that they will not be liable for loss by mortality. That word, in its ordinary and popular sense, signifies death arising from natural causes, and not from violence. I think, therefore, that the underwriters must be taken to have intended to exempt themselves, by this exception, from that species of loss which occurs

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red in *Tatham v. Hodgson*, viz. a loss of which death was the proximate cause, and the perils of the sea the remote cause. Here the injury done to the animals arose directly and immediately from the violence of the tempest, or in other words, from the perils of the sea. For these reasons, I am of opinion, that the plaintiff is entitled to the judgment of the Court.

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 LAWRENCE
against
ABRAHAM.

Judgment for the plaintiff.

LONGRIDGE and Others against DORVILLE and Another. *Monday,
October 29th.*

DECLARATION alleged, "that before the making of the promise, &c. a certain ship, called the *Carolina Matilda*, had then lately in a certain place, (to wit,) in the *River Thames*, (to wit,) at, &c. run foul of a certain other ship called the *Zenobia*, whereby the said last-mentioned ship had received great damage. And the said last-mentioned ship having received such damage, in consequence of being so run foul of as aforesaid, the plaintiffs, being the agents in that behalf of one — Symonds, the owner of the *Zenobia*, and the defendants, being the agents in that behalf of the owners of the

The giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and, therefore, where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of

the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages: Held, that there being contradictory decisions as to the point, whether ship owners were liable for an injury done while their ship was under the controul of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages.

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against
Dorville.

Carolina Matilda, the former, as such agents, detained the *Carolina Matilda*, till the owners of the said last-mentioned ship should have made good to them the damage so done to the *Zenobia*." It then stated, "that in consequence of such detention, the defendants undertook that they would, on the plaintiffs renouncing all claims on the *Carolina Matilda*, and on proving the amount of the damages sustained by the *Zenobia*, indemnify the plaintiffs for any sum not exceeding 180*l.*, the exact amount to be ascertained when the said latter ship should have been repaired;" and then alleged, that, in consequence of such undertaking, the plaintiffs did renounce all claim on the *Carolina Matilda*, and did permit and allow her to proceed on her voyage, and that the *Zenobia* had been repaired, and that the amount of such repairs was ascertained. There were also the common counts, and the defendants pleaded the general issue. The cause was tried before Abbott C. J. at the sittings after Easter term, 1820, when a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:

The Norwegian ship, called the *Carolina Matilda*, on her voyage to Norway, in sailing down the river *Thames* in November last, ran foul of the ship called the *Zenobia*, then lying at anchor, and in consequence of which, the latter ship sustained considerable damage. The plaintiffs, acting as the agents of Mr. R. Symonds, the owner of the *Zenobia*, instituted a proceeding in the High Court of Admiralty against the ship *Carolina Matilda*, to compel her owners to make good the damages sustained by the *Zenobia*, in consequence of being so run foul of. Process was issued against the *Carolina Matilda*, under which she was arrested

arrested at *Gravesend* on the 22d November last, and on the 24th day of the same month, the defendants wrote a letter to the plaintiffs, of which the following is a copy : " Messrs. *Longridge, Barnett, and Hodgson*. Gentlemen, In consequence of your having detained the *Norway* ship *Carolina Matilda*, till the owners make good to you the damage done to the *Zenobia*, bound to *Smyrna*, we hereby engage, on your renouncing all claims on the said ship *Carolina Matilda*, and on proving the amount of damages sustained by the *Zenobia*, to indemnify you for any sum not exceeding 180*l.*, the exact amount to be ascertained when the *Zenobia* is repaired." The defendants were the agents of the owners of the *Carolina Matilda*, and upon the receipt of this letter, the plaintiffs withdrew the proceedings in the Admiralty Court, and the officer, then in possession of the *Carolina Matilda*, was then also withdrawn, and such possession delivered up to the defendants, acting on behalf of her owners. The *Zenobia* had been since repaired, and the amount of damages sustained by her had been ascertained. At the time the *Carolina Matilda* sailed, and while she was proceeding down the river and ran foul of the *Zenobia*, she had the regular *Trinity-house* pilot aboard, who had been placed there by the defendants.

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 Longridge
against
Doaville.

Puller, for the plaintiff. It is not necessary to consider the question, whether the owners of the *Carolina* are liable for the damage done to the *Zenobia*, under the circumstances of the case ; for the defendants have made themselves liable by an express promise, founded upon a good consideration. The plaintiffs agree to release the ship, which they might otherwise have detained until

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 LONGRIDGE
 against
 DORVILLE.

bail was given ; and the defendants agree to pay a stipulated sum by way of damage ; waiving all question as to the legal liability of the owners. That might be considered as doubtful, there having been contradictory decisions. (a) The defendants, or their principals, therefore, have obtained a benefit by the immediate release of the ship ; and that constitutes a good consideration for the promise laid in the declaration.

F. Pollock, contra. There is no sufficient consideration for the promise in the declaration, because the plaintiffs had no ground for instituting the suit in the Admiralty Court against the *Carolina*. The question whether the defendants are liable upon their undertaking, must depend upon this, whether the owners were liable for the injury, the ship at the time having on board a pilot, as required by the act of parliament. If they were not liable, the plaintiff had no right to institute the suit in the Admiralty Court ; and the forbearance of a suit, where a party is not liable, is not a good consideration. *Tooley v. Windham* (b) and *King v. Hobbs* (c) are authorities in point.

ABBOTT C. J. I am of opinion, that there is a sufficient consideration in this case to sustain the promise, without enquiring whether the owners of the ship are liable, under the circumstances of the case. It appears that a suit had been instituted by the plaintiffs in the Court of Admiralty against the *Carolina Matilda*, to compel her owners to make good the damage done by

(a) *Neptune the Second*, *Dodson, Adm. R.* 467. *Ritchie v. Bowfield*,
7 Trant. 309.

(b) *Cro. Eliz.* 206.

(c) *Yelverton*. 25.

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her running foul of another vessel. The ship might have been redeemed from that suit, by the defendant's giving bail, that proper care should be taken of the ship, and that those on board her should not leave the kingdom, until means were taken to secure that evidence which would enable the Judge to decide the suit, and the plaintiffs might have insisted on such bail. The defendants, as agents for the foreign owners of the ship, write a letter, in which they engage, on the plaintiff's renouncing all claims on the ship, and on proving the amount of damages sustained by the *Zenobia*, to indemnify them for any sum not exceeding 180*l.*, the exact amount to be ascertained when the *Zenobia* is repaired. Now the plain meaning of that engagement appears to me to be this. Release the ship, and we will waive all questions of law and fact, except the amount of damage; we will pay you 180*l.* if the damage done amounts to that sum. The plaintiffs, by not insisting upon the bail required, therefore relinquished a benefit which they might have had, if the law had been with them. The law might fairly be considered as doubtful, for there had been contradictory decisions on the subject; and the parties agree to put an end to all doubts on the law and the fact, on the defendants engaging to pay a stipulated sum. I am of opinion that this case is distinguishable from those cited in argument, inasmuch as in this case, the law was doubtful, and the parties agreed to waive all questions of law and fact. I am therefore of opinion, that the plaintiff is entitled to recover.

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LONGRIDGE
against
DORVILLE.

BAYLEY J. I am of the same opinion. Where a cause is depending, it is competent to a party to refer the questions of liability and damage jointly, or to ac-

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LONGRIDGE
against
DOUVILLE.

knowledge his liability; and refer the question of damage only; and in this case, I think, the effect of the agreement is, that they the defendants acknowledge the liability of the owners, and, in consideration of the plaintiffs' releasing the ship, they agree to refer the question as to the amount of damage, and pay the same, provided it does not exceed 180*l.* If it had appeared, in this case, that the owners of the *Carolina* could not have been liable at all, I agree that the consideration for the promise would have failed. But the facts stated in the case by no means shew that the owners would not have been liable; for by the pilot act, the owners are only protected in those cases where the loss arises from the default, neglect, incapacity, or incompetency of the pilot. Now there is no fact in this case which shews, that misconduct of the pilot was the cause of the injury.

HOLROYD J. I am of the same opinion. If a person is about to sue another for a debt, for which the latter is not answerable, the mere consideration of forbearance is not sufficient to render him liable for that debt. Any act of the plaintiff, however, from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, is a sufficient consideration to support a promise. Now, the consideration of forbearance is a benefit to the defendant, if he be liable; but it is not any benefit to him, if he be not liable. The authorities cited proceed on that ground. This case differs materially from those; for here, a suit actually commenced is given up, and a suit, too, the final success of which was involved in some doubt. The plaintiff might sustain a detriment by giving

giving up all claim in respect of the expenses incurred, and the defendant might derive a benefit, by having that suit put an end to, without further trouble or investigation. Now I am of opinion, that the giving up of a suit instituted for the purpose of trying a doubtful question, and consenting to deliver up the ship, which might otherwise have been detained until the security required was given, is a good consideration to support a promise to pay a stipulated sum, by way of damage, in case the actual damage amount to that sum. In *Com. Dig. tit. Action on Case upon Assumpsit*, F 8., it is laid down, that an action does not lie, if a party promise, in consideration of a surrender of a lease at will; for the lessor might determine it, unless there was a doubt whether it was a lease at will or for years; and 1 *Roll. 23. L. 25. 35.* and 1 *Brownlow*, 6. are cited. That is an authority to shew, that the giving up of a questionable right is a sufficient consideration to support a promise. Here, therefore, the giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration to support a promise. I think, therefore, that this action is sustainable.

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LONGRIDGE
against
DONVILLE.

BEST J. concurred.

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*Monday,
October 29th.*

A pawnbroker
is a broker
within the
5 C. 2. c. 30.
s. 39., and,
therefore, sub-
ject to the
bankrupt laws.

A person
who had for-
merly taken in
goods upon
pledge, but had
ceased to do so,
still continuing
to sell the un-
redeemed
pledges, there-
by carries on
the trade of a
pawnbroker,
and is subject
to the bankrupt
laws.

RAWLINSON *against* PEARSON and Others.

ASSUMPSIT for money had and received. Plea,
general issue. At the trial before Park J., at the
Lancaster Spring assizes, 1820, a verdict was taken for
the plaintiff, subject to the opinion of the Court on the
following case:

On the 2d June, 1818, a commission of bankrupt
issued against the plaintiff, on the petition of *Daniel Potter*, under which commission the plaintiff was de-
clared a bankrupt, and the defendants were chosen
assignees, and as such, received certain money, the
produce of the estate of the plaintiff. The petition-
ing creditor's debt was upon a promissory note, drawn
by the plaintiff, in favour of *Potter*, for the sum of
311l. 3s. 9d., bearing date the 17th January, 1818,
payable at three months after date, and which note was
dishonoured when due. This note had been given by
the plaintiff to *Potter* for the amount of the damages
and costs awarded to *Potter* in an action brought by
him against plaintiff, for an injury occasioned by the
negligence of one of the agents of the plaintiff. The
award was made on the 15th January, 1818. The
plaintiff, for many years, had carried on the business of
a pawnbroker at *Manchester*, but for nearly five years
before the issuing of the commission, he had ceased
to take in any goods to pledge; he had a shop for sale
and another for taking in pledges. The two shops ad-
joined each other; there had been an internal commu-
nication between them, until it was stopped up about

five years ago : his pawnbroker's sign, however, remained over the door of the shop for sale until after the issuing of the commission. After the time when he so ceased to take in goods to pledge, he sold, from time to time, to any persons willing to purchase the same, different articles of the forfeited or unredeemed pledges which he had received in the course of his business as a pawnbroker, and which still remained upon hand ; the shop for sale remained open, till the issuing of the commission, to sell off his forfeited pledges, and he could not carry on his business without it. The act of bankruptcy was committed in *February, 1818*

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RAWLINSON
against
PEARSON.

Tindal, for the plaintiff. There are two questions in this case, first, whether a pawnbroker is subject to the bankrupt laws; 2dly, assuming that he is, then, whether the plaintiff in this case continued to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued. A pawnbroker is not a trader; for he does not seek his livelihood by buying and selling. The question, then, is, whether he can be considered as a broker within the meaning of the 5 G. 2. c. 30. s. 39. That section of the statute recites, that bankers, brokers, and factors are entrusted with money and goods belonging to other persons; and then enacts, that they shall be subject to the bankrupt laws. The reason of the statute is on account of the great value of property belonging to others with which the persons there described are trusted. Now, pawnbrokers are not within the reason of the statute, for the property which they have in their possession, belonging to others, does not usually greatly exceed in value the money advanced upon it. There is not, therefore, the same trust

reposed

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against
PEARSON.

reposed in them as there is in the case of bankers, or brokers, or factors. They are not, therefore, within the spirit of the statute; nor are they within the words of the statute; for they cannot be considered as brokers; that term being used to denote a person who makes bargains for other persons. They were not considered brokers at the time when the 5 G. 2. c. 30. passed. The statute 1 *Jac. I. c. 21.* speaking of the sworn-brokers of the city of *London*, describes them to be persons who never, of any ancient time, used to take pawns and bills of sale of garments and apparel, &c. for money lent upon usury, or to keep open shops, as of late years had been used by citizens, assuming to themselves the names of brokers and brokerage, as though the same were an honest trade; terming themselves brokers *whereas in truth* they are not, abusing the true and ancient name and trade of broker. In sect. 3. they are styled counterfeit brokers and pawn-takers upon money, &c. They are not again mentioned in any other statute before the 5 G. 2. s. 30. passed. In the 30 G. 2. c. 24. s. 4., they are described as persons who take goods by way of pawn. In the 25 G. 3. c. 48. they are, for the first time, called pawnbrokers by the legislature. At all events, the plaintiff had ceased to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued. The 30 G. 2. c. 24. describes pawnbrokers to be persons taking goods by way of pawn, pledge, and exchange. Now, the plaintiff had ceased to take goods by way of pledge long before the petitioning creditor's debt accrued. He, indeed, sold the unredeemed pledges. That was not any necessary part of his business of a pawnbroker described in the statute; it only became necessary in consequence of the pawners not redeeming the

the goods pledged within the time prescribed by law. At all events, this was only one part of the business belonging to a pawnbroker.

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 RAWLINSON
against
PEARSON.

Parke, contra. A pawnbroker is a person subject to the bankrupt laws, and falls within the meaning of the word broker in the 5 G. 2. c. 30. s. 39. Lord *Hardwicke*, within five years after the passing of that statute, stated that he was clearly of opinion, that "a pawnbroker was within the several statutes concerning bankrupts, and especially within the general words of the 5 G. 2., and that, although pawnbrokers are not expressly named, yet the general word *brokers* is the genus, and all other kinds of brokerage, the species." *Hightmore v. Molloy.* (a) It seems therefore, that, at the time of passing the act, a pawnbroker was considered as a species of broker. He seems, indeed, to be a person contemplated by the very first statute made against bankrupts, the 34 and 35 Hen. 8. c. 4. For a pawnbroker is "a person obtaining into his hands great substance of other men's goods." The stat. of the 5 G. 2. did not contemplate such persons only; for a broker, (one of the persons expressly named,) is very rarely entrusted with the possession of the goods of the persons for whom he makes bargains. Assuming therefore, that a pawnbroker is a subject of the bankrupt laws, the present plaintiff continued to carry on that business at the time when the petitioning creditor's debt accrued. The profits of the business (if fairly conducted) are derived wholly from the increased rate of interest which pawnbrokers are allowed to take on the money they advance upon goods. They are authorized to sell the goods

(a) 1 *Edyns.* 206.

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PEARSON.**

pledged at the expiration of one year, provided they are not redeemed within that time. In that case, unless they sell the goods, they could not derive any profits whatever from their business, because they would not receive that interest which the law allows them as their only profit. Indeed, if the plaintiff ceased to carry on the business of a pawnbroker when he discontinued taking in goods on pledge, the consequence would be, that he would have been guilty of usury, by taking that rate of interest which the law allows a pawnbroker alone to receive. The plaintiff in this case, at the time when the petitioning creditor's debt accrued, was still selling the unredeemed pledges, and receiving the increased interest on account of the money he had advanced; he therefore continued to carry on the business of a pawnbroker. This very case was, on a former occasion, argued fully before the Judges (a) of the Court of Common Pleas at *Lancaster*, and they, after great consideration, gave judgment for the defendants.

ABBOTT C. J. I am of opinion, that a pawnbroker is a broker within the meaning of the stat. 5 G. 2. c. 30. The 39th section of that act recites, "that persons dealing as bankers, brokers, and factors, are frequently entrusted with great sums of money, and with goods and effects of very great value belonging to other persons," and then enacts, "that such bankers, brokers, and factors, shall be subject to this and other statutes made concerning bankrupts." Now, a pawnbroker certainly is a person contemplated in the preamble. For in the course of his trade, he is perhaps more frequently than other persons, entrusted with goods and effects of value

(a) *Wood B. and Beyley J.*

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belonging to others. He comes also within the general name of broker. The opinion of Lord *Hardwicke* upon this subject is entitled to great weight; but even without the aid of his authority, I should have entertained no doubt, that a pawnbroker is within the spirit and words of the act. The next question is, did the bankrupt continue to carry on the trade of a pawnbroker, at the time when the petitioning creditor's debt accrued? Now, the trade of a pawnbroker consists of two parts: first, that of receiving pledges of others, and secondly, that of selling those pledges. In this case, he had ceased to take in pledges, but he continued to sell them, subject to the conditions imposed by law. One of those conditions was, that he was to account for the overplus to the owner of the goods; the party pledging, having a right to redeem within a certain time, on paying a rate of interest much exceeding 5 per cent. per annum. Now, it would be unlawful for the plaintiff to take that rate of interest, except in his character of pawnbroker. As long, therefore, as the pawners of the goods had a right to redeem, the plaintiff was clearly carrying on the business of a pawnbroker, and even when he sold the goods, he was bound to account to the owner for the overplus, and therefore, as long as he continued to sell the forfeited pledges, he sold as a pawnbroker. He therefore continued to carry on the business of a pawnbroker at the time when the commission issued. In this case, I am therefore clearly of opinion, that a pawnbroker is a broker within the meaning of the stat. 5 G. 2. c. 30. s. 39., and that the present plaintiff continued to carry on the business of a pawnbroker at the time when the debt of the petitioning

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creditor accrued. The judgment therefore must be for the defendants.

BAYLEY J. I am clearly of opinion, that a pawn-broker is a broker within the meaning of the 5 G. 2. c. 30. s. 39. I think that he must have been so considered at the time of passing that act. For *Lord Hardwicke*, within a very few years afterwards, considered a pawnbroker to be a person clearly within the meaning of the act. He is certainly within the mischief intended to be remedied. For in the course of his business, he is entrusted with effects of value, for which he is accountable to many different persons. From the very nature of his business, therefore, he would be liable to a great many suits, the expense of which might be ruinous to his estate, and detrimental to those who sue him. Now one of the great objects of the bankrupt laws is, to distribute the property of the bankrupt reasonably among the creditors, without driving each individual to the necessity of bringing an action. A pawnbroker, therefore, comes within that very description of persons whom the legislature intended to be subject to the bankrupt laws. This case was formerly discussed before the Judges of the Court of Common Pleas at *Lancaster*; and without attaching any degree of weight to the opinion of one of the Judges who concurred in the former decision, I may say, that, upon that occasion, the parties had the benefit of the judgment, experience, and learning of Mr. *Baron Wood*, who, after great and careful consideration, gave his deliberate opinion, that it was a case within the words and the spirit of the statute 5 G. 2. c. 30. s. 39. On the other point

point I cannot entertain any doubt. Part of the business of the pawnbroker is to take in pledges, and hold them in his hands, charging a higher rate of interest for the money he advances than the law in other cases allows; the other part of his business is to sell the pledges, on the joint account of himself and the person by whom the goods were pawned. As long therefore as he continues to sell, he sells in the character of pawnbroker, and continues to be accountable to the proprietors for the value of the goods. If, indeed, we were to hold, that he ceased to carry on the trade of a pawnbroker, when he ceased to take in goods upon pledge, the consequence would be, that any pawnbroker, as soon as he got a large quantity of goods into his possession, might discontinue taking in any more, and afterwards commit an act of bankruptcy without being subject to the bankrupt laws. For these reasons I am clearly of opinion, that a pawnbroker is both within the spirit and words of the statute, and that this plaintiff continued to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued.

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Rawlinson
against
Pearson.

HOLROYD J. I am also of opinion that a pawnbroker is a person subject to the bankrupt laws. Lord Hardwick's opinion, in *Highmore v. Molloy*, having been delivered within a very few years after the stat. 5 G. 2. c. 30., raises a strong inference that, at that time, pawnbrokers were considered as a species of brokers; and that they, therefore, came within the statute. The 39th section of the stat. 5 G. 2. c. 30. is not merely an enacting clause; but, after reciting "that persons dealing as bankers, brokers, and factors, are

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against
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frequently entrusted with great sums of money, and with goods belonging to other persons," declares the persons coming within that description to be subject to that and the other statutes made concerning bankruptcy. Lord *Hardwicke's* opinion being, that pawnbrokers are a class of brokers, and it appearing by the 39th section of the statute, that brokers are within the provisions of the prior bankrupt laws, I think that a pawnbroker is clearly within the intent of that statute. That being so, then the question is, whether he continued to deal as a pawnbroker at the time when the petitioning creditor's debt accrued. I think that he did continue to deal as a pawnbroker, although he did not continue to deal as such in all the departments of that trade; he continued, however, to sell the pledges, which he was entitled to keep for a particular purpose, viz. that of selling the same, and thereby to derive a greater benefit from the increased interest, by reason of his being a pawnbroker, than he otherwise could by law do. I think that, by continuing to sell these goods with a view to these advantages, he continued to trade as a pawnbroker. For these reasons, I am of opinion that there must be judgment for the defendants.

BEST J. I am of the same opinion. Although the statute 1 *Jac.* 1. c. 21. speaks in contemptuous terms of those persons who carry on the business of pawnbrokers, yet it afterwards calls them brokers; for in the 5th section, it is enacted, "that no sale, exchange, pawn, mortgage of any jewel, pledge, &c. to any broker or brokers, or pauntakers," &c.; and in the 7th section brokers or pauntakers are mentioned. We have, therefore, the authority of the legislature as early as the reign

reign of *James* the First, to say, that this description of persons were called brokers; and if they are brokers, and in the course of their business have other men's goods entrusted to their care, they come within the words of the 5 G. 2. c. 30. s. 39. I am, therefore, clearly of opinion, that the plaintiff is a person subject to the bankrupt laws; and I am also of opinion, that he continued to deal as a pawnbroker as long as he did any one act which fell within the range of the business of a pawnbroker. Now, it is part of the business of a pawnbroker to sell the property pledged, if unredeemed, and out of the proceeds to pay himself the amount of the sums he has advanced, and to account for the residue to the person to whom it belongs. During the time he is acting in the character of a pawnbroker, all the legal liabilities belonging to that character attach to him. I think, therefore, that the plaintiff was a broker within the meaning of the stat. 5 G. 2. c. 30. s. 39., and that he continued to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued.

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against
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Judgment for the Defendants.

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*Thursday,
November 1st.*KNOWLES *against* HORSFALL and Others.

A., a spirit merchant, sold to *B.*, a wine merchant, several casks of brandy, some of which, at the time of the sale, were in *A.*'s own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided that this sale had taken place, but no notice of such sale had been given to the warehouse-keeper,

with whom some of the casks were deposited. *A.* having become bankrupt while the brandies remained where they were originally deposited, it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 *Jac.* 1. c. 19. s. 11.

TROVER for seventeen pieces of brandy. Plea, not guilty. At the trial, before *Bayley J.*, at the Lancaster Summer assizes, 1819, a verdict was found for the plaintiff, subject to the opinion of this Court, on the following case.

The plaintiff was a wine merchant, at *Liverpool*, and the defendants were the assignees of one *W. Dixon*, of *Liverpool*, wine and spirit merchant, who had been duly declared a bankrupt, upon an act of bankruptcy committed the 17th *April*, 1819. *Dixon* bought and imported the brandies in question, being part of a much larger quantity from *France*, several months before his bankruptcy, and upon their arrival, he entered them in his name in the books of the Custom-house and Excise-office at *Liverpool*, and he afterwards bonded them in his name. The brandies, at the time of the action, still remained bonded and entered in his name there. There was no evidence of any express notice having been given by the plaintiff to the excise, of the purchase, and the duties thereon were unpaid. The warehouses in which bonded goods are deposited at *Liverpool*, lie in different parts of the town, and the bonded goods deposited therein on importation are placed under three locks,

locks, one of the customs, one of the excise, and one of the owner or occupier of the warehouse; and in cases where the importer has no bonded warehouse of his own, or not sufficient room in it, it is the usual course of trade at *Liverpool* to deposit them in the bonded warehouse of some other person on payment of rent. The brandies imported by *Dixon* were deposited part in vaults occupied by him, at annual rents, and the residue in two bonded vaults of one *Ledson*, a regular warehouse keeper in *Liverpool*. It was notorious at *Liverpool*, that *Dixon* had rented warehouses, and that renters of warehouses often take in other persons' goods. All these vaults were under the locks before mentioned, but the merchants' keys of the two vaults occupied by *Dixon* were kept by him as occupier of such vaults, until the time of his bankruptcy, and are now in the custody of his assignees. In *February* and *March*, 1819, *Dixon* sold to the plaintiff 52 pieces of brandies lying in the vaults rented by him, and seventeen in *Ledson's*. At the time of each sale, it was agreed, that the brandies should remain in the several warehouses in which they were then deposited rent free, until it suited the convenience of the plaintiff to remove them. Upon each sale, *Dixon* delivered to the plaintiff samples of the respective brandies, the same being part of the bulk, and regular invoices were made out by *Dixon* and delivered to the plaintiff, and the latter paid *Dixon*, before his bankruptcy, for all the brandies, according to such invoices. It was well known in *Liverpool*, that *Dixon* had imported the brandy, and that it was in the above-mentioned warehouses; and it was notorious, that he had rented the warehouses, and it was notorious, in the wine trade, that these sales had been made to *Knowles*.

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against
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against
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mediately after each sale, the plaintiff caused the letter K. to be marked in chalk on each of the casks, by his warehouseman, according to his usual custom, in all purchases made by him, which mark remained visible on the casks, until after the time of *Dixon's* bankruptcy. The plaintiff afterwards, and before the bankruptcy of *Dixon*, resampled all the brandies he had purchased of him. The resampling cannot take place, except in the presence of an officer of the excise, to whom the old samples, or a quantity equal to that of the new sample, is delivered up, and by him put back into the bulk, and he then draws out new samples, and delivers them to the person applying; it is not necessary for the persons applying to take the old sample bottles. No entry is made in any book of the name of the person taking fresh samples. The authority upon which the officer of the excise resampled the brandies was an order signed by the plaintiff, but without any authority from *Dixon*. The order for resampling is filed, but the public have no access to the file, nor would the fact of resampling have prevented *Dixon*, or any subsequent purchaser from him, removing the brandies, as, if he had paid the duty, the excise would have delivered them to him. Brandies are always entered in the importer's name, and no change of entry is allowed. The plaintiff, before *Dixon's* bankruptcy, resold 26 pieces of the brandies, part of which were in each of the vaults above mentioned, and which were delivered to the respective purchasers upon such resale; but the orders for the delivery of such of the brandies, so resold by the plaintiff, as were in *Ledson's* vaults, were drawn up by the plaintiff, and signed by *Dixon*, addressed to *Ledson*, for delivery of such a quantity specifically as was mentioned

tioned in each of those orders; and such of them as were lying in *Dixon's* vaults, were delivered by him to the several purchasers, on application by the plaintiff to *Dixon*, without any order. At the time of *Dixon's* bankruptcy, eighteen pieces of the brandies remained undisposed of, whereof seven were lying in *Ledson's* vaults, and eleven in the vaults rented by *Dixon*; but the plaintiff subsequently procured the delivery of one of those in *Ledson's* vaults, upon an indemnity. The brandies deposited in *Ledson's* vaults were entered by him in his book, and still remain in the name of *Dixon*; and it is customary to produce a written order, signed by the person in whose name the brandies stand, before any person can obtain their delivery, and no such order was obtained by the plaintiff as to the brandies in question. At the time of the bankruptcy, the plaintiff could not have got the brandy at *Ledson's* without an order from the bankrupt; and any other person to whom the bankrupt had given an order would have gotten it, and the bankrupt might have delivered the brandies in his own vaults, to any one he had pleased. It is the constant custom at *Liverpool*, not to rebond goods on any intermediate change of ownership, nor to remove them out of the bond warehouses in which they were first deposited, until such removal becomes necessary, for the purpose of consumption or exportation; but the bond remains with the excise, in the name of the first importer, till it is cancelled, on the payment of the duties by the proprietor who removes the goods out of bond. The brandies in question were regularly demanded by the plaintiff before the action, and refused to be delivered up by the defendants.

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Tindal. These casks of brandy were not in the possession, order, and disposition of the bankrupt, at the time of the bankruptcy, within the meaning of the 21 Jac. 1. c. 19. s. 11., for immediately after each sale to the plaintiff, the latter had a mark, denoting the transfer of the property to him, affixed upon the casks, and that distinguished these brandies from others belonging to *Dixon*. In *Thackthwaite v. Cock* (*a*), the hops remained undistinguished from the rest of the merchant's stock. Besides, it was notorious to all those carrying on the same trade at *Liverpool*, that such transfer of property had taken place; they were the persons most likely to have dealings with the bankrupt, and, therefore, he was not likely to acquire that false credit by the possession of the goods which the statute was intended to prevent. It was notorious, also, at *Liverpool*, that sales take place whilst the goods are bonded; and it was the custom at *Liverpool*, not to rebond or remove goods out of the warehouse, upon an intermediate change of property, until such removal becomes necessary, for immediate consumption or exportation. A purchaser, who must be taken to be aware of such a custom, had no right to assume, from the fact of the goods having continued in the possession of the bankrupt, that the property had not been changed. In *Flinn v. Matthews* (*b*); the bankrupt, on the 8th of *July*, had sold a certain quantity of tar, then lying on the quay at *Liverpool*, which tar was to be shipped to *Ireland*, and it was agreed that the tar should be lodged in a warehouse, until the vendee should have an opportunity of shipping it off. The bankrupt placed the tar in a cellar of his own, and became bankrupt in the beginning of *August*. Lord *Hardwicke* was of opinion, that this

(*a*) 3 *Term.* 487.(*b*) 1 *Atkyns.* 185.

was not a case within the statute, for it was merely a temporary custody, because the vendee had not an opportunity of selling it, by shipping it off immediately to *Ireland*. That case is an authority in point, for here, the bankrupt had only a temporary custody of the goods, viz., until the plaintiff had an opportunity of selling them; and the period that elapsed in this case between the sale to the vendee and the bankruptcy of the vendor, does not much exceed the time that elapsed between those events in *Flinn v. Matthews*.

Parke, contra, was stopped by the Court.

ABSOFT C. J. I am clearly of opinion that all these brandies were, at the time of the bankruptcy of *Dixon*, in his possession, order, and disposition, by the consent and permission of the true owner, within the meaning of the 21 Jac. 1. c. 19. s. 11. It appears, upon the facts stated, that some of the casks remained in the vaults of *Dixon*, the original seller, and that the others were in the vaults of *Ledson*, a warehouse-keeper. As to the latter parcel, if the plaintiff had given notice of the sale to the warehouse-keeper, the latter would not then have been justified in delivering them to any other order than that of the plaintiff; but not having received any such notice, the warehouse-keeper would have been justified in delivering them to the order of *Dixon*, who had placed them there. It is clear, therefore, that that parcel of goods remained after the sale, subject to the order and disposition of the bankrupt. With respect to the brandies which remained in his own vaults, the case is much stronger; because, as to them, *Dixon* united in himself the character of warehouse-keeper and

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and that of merchant or dealer in the commodity. Any person who went for the purpose of purchasing these brandies, could not know that *Dixon* did not continue the owner. He had the corporeal power over them. The letter K. marked on the casks might speak a language, to a certain class of persons, intelligible; but to others who might be induced to become the creditors of *Dixon*, in the belief that the brandies belonged to him, it would be wholly unintelligible. If any person of the latter description had purchased them of the bankrupt, I have no doubt that he would have had a good title to them, as against the plaintiff; for the real owner ought not to have left the goods, after the purchase, in the hands of *Dixon*, and suffered him to treat them as his own. For these reasons, I am of opinion, that there must be judgment for the defendants.

BAYLEY J. This is a very clear case. Some of the casks were in the vaults of *Ledson*, and others in vaults rented by *Dixon*. As to the former parcel, it appears that *Ledson* would not deliver them to the order of any other person than that of the bankrupt. Those goods, therefore, were clearly in the possession, order, and disposition of the bankrupt. It was necessary, that something should be done to make the change of property notorious to the public at large, or at least to those persons who were likely to trust the bankrupt, upon the faith of his having the property in these goods. It is not sufficient, that it should be known only to persons in the same trade. Now, as to the brandy which remained with *Ledson*, there was nothing done to make the change of property notorious. The other parcel of brandy remained in *Dixon's* own vaults, so that if any person

person who was not in the wine trade at *Liverpool*, had gone to *Dixon* to purchase it, he would have had the power of selling and delivering it to such person. Now, when the original proprietor of goods continues to have the power of sale and delivery, he has the property in his possession, order, and disposition, within the meaning of the statute.

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BEST J. This case comes directly within all the words of the statute, for here the bankrupt had the possession, order, and disposition of the brandies, with the consent of the true owners. According to the facts stated, the goods would not have been delivered to any other order than his; he therefore had the power of sale and delivery, and that brings the case within the very words of the act of parliament. The case of *Flinn v. Matthews* (*a*) is distinguishable from the present, because the goods there were to be left in possession of the bankrupt only till they could be conveniently shipt. In this case, the brandies were to remain in the bankrupt's warehouse till the plaintiff could sell them, and they had in fact continued there for a considerable time. It is not sufficient that the sale was known to persons in the wine trade at *Liverpool*. The transfer of the property ought to have been known to all other persons who might, in consequence of the bankrupt's continued possession of it, have been induced to give him credit. In the case of *Thackthwaite v. Cock* (*b*), it was decided by the Court of Common Pleas, that "a custom that purchasers of hops from hop merchants

(*a*) 1 *Atkyns*, 185.

(*b*) 3 *Taunt.* 487.

should

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should leave them in the merchant's warehouse for the purpose of resale, upon rent, undistinguished from the merchant's stock, was not such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition." That case is an authority to shew, that the present plaintiff is not entitled to recover, and consequently there must be judgment for the defendant. (a)

Judgment for the defendant.

(a) Holroyd J. was absent at Chambers.

*Thursday,
November 1st.*

**Doe on the Demise of ROBINSON against
ALLSOP.**

Where there were two assignments of the same lease of premises within the county of Middlesex, and that executed last was registered first: Held, that the deed last registered must, in a court of law, be considered as fraudulent and void, in consequence of *7 Ann. c. 20. s. 1.*, although the party claiming under the second assignment had full knowledge, when it was executed, of the prior execution of the first assignment.

EJECTMENT to recover certain premises in the parish of *Saint Mary-le-bone*, in the county of Middlesex. Plea general issue. The cause was tried before Abbott C. J. at the *Westminster* sittings after Michaelmas term, 1820, when a verdict was found for the plaintiff, subject to a special case upon the following facts. The demise was laid on the 2d day of *March*, 1818. By lease dated the 30th day of *March*, 1813, the premises in question were demised by *Matthew Wood* to *George Stoddart*, since deceased, for a term of 88 years. This lease was prepared by the then attorney of *Stoddart*, and left by *Stoddart* in his possession. About this time, the plaintiff, *Robinson*, paid

large

large sums of money for, and on account of *Stoddart*, and by his desire also, paid a sum of 13*l.* 14*s.* 6*d.* for, and obtained the possession of the lease from the attorney who had prepared it, and with whom it had been left. On the 29th *October*, 1813, upon a settlement of accounts between *Stoddart* and *Robinson*, *Stoddart* gave to *Robinson* an acceptance for 83*l.* 5*s.*, which was then due to *Robinson*, in addition to the former sum of 13*l.* 14*s.* 6*d.*, and in the month of *February*, 1814, *Robinson* further paid on account of *Stoddart*, 70*l.*, and put into an auctioneer's hands the lease to be sold by public auction. At the sale, no person bidding sufficiently high for the premises, they were bought in, and the lease delivered back to *Robinson*. By indenture of the 25th day of *July*, 1814, in consideration of 190*l.*, *Stoddart* assigned the lease and premises to one *Jeremiah Moore* for all his term therein, but the lease remained in *Robinson*'s possession. On the 4th day of *November*, 1815, *Stoddart* was discharged from the King's Bench prison, pursuant to an order of the Court for the relief of insolvent debtors, and, upon his discharge, by indenture bearing date the 4th day of *November*, 1815, assigned all his estate, property, and effects in possession, remainder and reversion, to the provisional assignee of the insolvent debtors' court. This assignment was registered in the register office, in the county of *Middlesex*, on the 7th day of *October*, 1818. In the schedule of the said insolvent's estate, property, and effects, filed in court, and which accompanied the assignment to the provisional assignee of the court, the lessor of the plaintiff, *Robinson*, was stated and returned as a creditor of the insolvent, and the premises in question were stated to have been mortgaged or conveyed,

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veyed, and then to be in mortgage and conveyed for 60*l.* to a Mr. *Barton Greenwood*, and also to the said *Jeremiah Moore*. On the 19th day of *December*, 1815, *Moore* put the premises up to sale by public auction. The auctioneer had not the original lease, which was at that time in *Robinson's* possession, but *Robinson* knew that he was about to sell the premises, and desired the auctioneer, if they went for a certain price, to buy them in for him. The premises, however, exceeded *Robinson's* price, and they were finally bought by one *William Barton*, and the auctioneer sometime afterwards told *Barton*, that if *Robinson* was paid 30*l.* he would give up the lease, but *Barton* refused. On the 31st day of *July*, 1817, the plaintiff, *Robinson*, as one of the creditors of *Stoddart*, took an assignment from the provisional assignee of *Stoddart*, of all the insolvent's estate and effects, and the 7th *October*, 1818, registered the original lease of the 30th day of *March*, 1813, and also, at the same time, registered the assignment to the provisional assignee, and the assignment from the provisional assignee to him, dated the 31st of *July*, 1817, and brought an ejectment against the then tenant in possession, in *Michaelmas* term, 1819, but was nonsuited by reason of his not being able to prove the discharge of *Stoddart* under the insolvent debtors' act by the regular proof. On the 9th *June*, 1819, *William Barton* assigned the premises to the present defendant, *George Alexander Allsop*, for the term therein, and the plaintiff, *Robinson*, brought the ejectment against the present defendant, who appeared as landlord. The assignments by *Stoddart* to *Moore* of the 25th *July*, 1814, and assignment from *Moore* to *Barton* of the

13th *July*, 1816, were not registered until the 27th day of *February*, 1819.

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Holt, for the plaintiff, contended, that a subsequent purchaser for a good consideration, having registered his title first, was to be preferred before the prior purchaser. By 7 *Anne*, c. 20. s. 1., all unregistered conveyances are to be adjudged fraudulent and void against subsequent purchasers for valuable consideration. That is decisive of the case. As to the knowledge of the prior conveyance, it can make no difference at law. All that it can do, is perhaps to entitle the defendant to relief in equity.

Abraham, contrà. The object of the act of parliament was to prevent frauds by secret conveyances. That is expressed to be its object in the preamble. Now, in the present case, there is clearly no fraud, for the fact of the existence of the prior conveyance was known to the subsequent purchaser. This, therefore, is not within the mischief intended to be remedied by the act. In *Cheval v. Nichols* (a), this was the view taken by the Court of the act. And in *Worsley v. Demattos* (b), Lord Mansfield puts the case of the subsequent purchaser with the knowledge of a prior unregistered conveyance, as a fraudulent act on the part of the former. He also cited *Le Neve v. Le Neve*. (c)

ABBOTT C. J. A court of law is now called upon for the first time, to put a construction on the words of this

(a) 1 *Sr. 664.*(b) 1 *Burr. 467.*(c) 3 *All. 646.*

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statute,

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statute, by which it is enacted, that every deed or conveyance that shall, after the 29th *September*, 1709, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee, for valuable consideration, unless a memorial thereof be registered before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim. Now it is impossible, that plainer words could be used, and I think, that, sitting in a court of law, we are bound to give effect to them, and that we cannot say, that this deed is not fraudulent and void within the meaning of this act, because, possibly it may turn out upon examination, that the defendant is entitled to some relief in equity. If there be any such ground, a court of equity may interfere, and this case shews clearly how inconvenient it would be, if this court were to enter into any equitable considerations. For here, it is clear, that the lessor of the plaintiff had at all events a lien on the instrument of conveyance. What effect that might have on a court of equity, I cannot say, but I think it at least is a fit matter for its consideration. We however, in a court of law, must give effect to the words of the act.

BAYLEY J. I am of the same opinion. The words of the statute are, that such deeds or conveyances shall be adjudged fraudulent and void against every subsequent purchaser for valuable consideration. It is to be observed, that the words "bonâ fide purchaser" are not used. I think, therefore, that we are bound in a court of law to give effect to these words. That seems to have been the opinion of the Judges in the cases cited, although they thought that a court of equity would, in

some

some cases, interfere to relieve the party. It is so laid down by Lord Hardwicke, in *Le Neve v. Le Neve*, and the words of Lord Mansfield, in *Doe v. Routledge* (a), are these, "Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside, because he has that notice which the act of parliament intended he should have." He therefore puts it as a case in which equity would interfere; and the circumstances of this case shew the propriety of our adhering to the words of the act; for I am by no means clear that we should not work great injustice, if we were to decide in favour of the defendant.

BEST J. (b) The words of this statute are quite clear, and in the absence of any case, I should think the plaintiff entitled to judgment. But it seems to me, that the case of *Le Neve v. Le Neve*, in which Lord Hardwicke considers the party under these circumstances as entitled to relief in equity, is an authority to shew, that at law he is without defence.

Judgment for the lessor of the plaintiff.

(a) Comp. 712.

(b) Holroyd J. absent at Chambers.

GOODE and BENNION against HARRISON.
(In Error.)

*Friday,
November 2d.*

W^RIT of error from the Court of Common Pleas, Where an infant held himself out as in partnership with I. S., and continued to act as such till within a short period of his coming of age; but there was no proof of his doing any act as a partner after twenty-one: Held, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one; and as he had neglected to do so, that he was responsible to persons who had trusted I. S. with goods, subsequently to the infant's attaining twenty-one, on the credit of the partnership.

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recover the amount of a certain bill of exchange for 187*l.* 12*s.* There were also other counts for goods sold and delivered. The only question made was as to the liability of *Bennion*. At the trial, at the *Lancaster* Summer assizes, 1819, before *Bayley* J., the counsel for the defendant, *Bennion*, tendered a bill of exceptions to the learned Judge's direction to the jury, which bill of exceptions stated the following facts, viz. that upon the trial the counsel for *Harrison*, to maintain their issue, gave in evidence that *John Goode* and *Bennion*, in *April*, 1818, called upon one *James Fair*, a broker, at *Manchester*; that *Goode* introduced *Bennion* to *Fair* as a friend of his from *Liverpool*, and said, "We want goods:" that *Fair* went with them to *Harrison* and other houses in *Manchester*, and introduced them to *Harrison* as the firm of *Goode* and *Bennion*: that they bought goods of *Harrison* to the amount of 130*l.*, and from several different other persons fifteen parcels, to the amount altogether of 1500*l.*, and *Fair* transmitted copies of the invoices of the goods, directed to *Goode* and *Bennion*, *Liverpool*, some of which were made out to the firm of *Goode* and *Bennion*, others to *John Goode* and *T. Bennion*: that some of the original invoices were seen by them in *Fair*'s counting-house, and the goods were forwarded to the address of *Goode* and *Bennion*, and remittances came back: that when *Goode* and *Bennion* were in *Manchester*, in *April*, 1818, *Goode*, in the hearing of *Bennion*, said, that if the goods they then bought would answer the purpose, in a very short time they would have 500 pieces of one sort and 500 of another sort: that after this *Fair* corresponded with the firm of *Goode* and *Bennion*: that in *April*, 1818, *Goode* and *Bennion* had a counting-house in *Liverpool*;

ver pool; that the name of *Goode* appeared on the private door, and remained there till *August*, 1819, but the name of *Bennion* did not appear at all on the counting-house: that *Goode* had been some time in the counting-house before this transaction of *Goode* and *Bennion*, but had not shipped goods before: that in the beginning of *January*, 1819, *Fair* received a letter, in the hand-writing of *Goode*, ordering goods, of which the following is a copy: “*Liverpool, January 4th, 1819.* My dear Sir, Though we have not yet received the promised detained accounts from *America*, we are anxious that all the opportunity of cheap purchasing may not go past. We, therefore, authorize you, if the terms are about the same, to purchase for *New York*, from $300L$ to $500L$ of the most saleable articles, to secure which more fully, we wish the greatest extent of credit mentioned in your letter. I am, for *G.* and *B.*, very respectfully, yours, *John Goode.*” That *Fair*, in consequence thereof, bought goods from *Harrison* to the amount of $187L$. $12s.$, having no reason to suppose that the connection between *Goode* and *Bennion* was put an end to, and forwarded the goods, and also a bill of parcels for the same, to the direction of *Goode* and *Bennion*, and that on the 16th *January*, 1819, *Harrison* drew a bill of exchange for the amount of those goods upon *Goode* and *Bennion*, which bill of exchange the said *John Goode* accepted in the name of *Goode* and *Bennion*, and which was the bill of exchange mentioned in the first count of the declaration: that *Fair* did not see *Bennion* from the time of his being in *Manchester*, in *April*, 1818, till the month of *February*, 1819, at which time *Bennion* asked *Fair* for the account current of *Goode* and

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against
Harrison.

Bennion for goods bought when he and *Goode* came to *Manchester*, in *April*, 1818, and said at the same time, that the transaction in *April*, 1818, was the only one that he was engaged in with *Goode*, and that all that account should be paid. That at the time of the purchases in *April*, 1818, *Bennion* did not say, that he was only going to enter into one adventure with *Goode*; that the said goods, so first purchased from the said plaintiff, and others, were paid for before the commencement of the action, and that *Goode* is since become a bankrupt. And the counsel for *Harrison*, to maintain the said issue, further proceeded, and gave in evidence the bill of exchange, and also a certain letter in the hand-writing of *Bennion*, addressed to *Fair*, as follows: "Liverpool, 20th April, 1819. Dear Sir, We shall be obliged by your purchasing for our account 100 pieces of the fancied bordered gingham dresses well assorted, and the remaining part of 100^l in fancy muslin bordered dresses, well assorted cash price, and request that they may be sent as soon as possible per waggon. I remain, dear Sir, for *Goode* and self, your's, *T. Bennion*." P. S. Please be very particular in the selection. And thereupon the counsel learned in the law for the said *Thomas Bennion*, in order to support the issue on his part, gave in evidence, that *Bennion* was born on the 29th *May*, 1797. And he also further gave in evidence by one *Riley*, that the said *Riley* was five months in the employ of *Goode*, previously, and at the time of the first purchase, and that he kept the books, and that *Bennion* was never a partner with *Goode* to the knowledge of *Riley*. *Riley* further proved, that he went to *Barbadoes*

with

with the goods purchased in *April*, 1818. That he sailed on the 30th *April*, 1818, and returned on the 5th *September*, 1818. That after the 5th *September*, 1818, *Goode* and *Bennion* communicated as private friends, but not in the way of business, and that he, *Riley*, never knew *Bennion's* name to be used in the purchase of goods after *April*, 1818. That whilst *Riley* was absent, he addressed and sent a letter to the said *Goode* and *Bennion* at *Liverpool*, relative to the said goods, so shipped in the name of *Goode* and *Bennion*. That *Riley* sometimes saw *Bennion* at the counting-house, but had no communication with him on business before he went, or after he returned. And the said counsel, for the said *Thomas Bennion*, did then and there insist before the said justice, on behalf of the said *Thomas Bennion*, that the said several matters so produced and given in evidence on the part of the said *Thomas Bennion* as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, to entitle the said *Thomas Bennion* to a verdict, and to bar the said *James Harrison* of his action against the said *Thomas Bennion*. And the said counsel, for the said *Thomas Bennion*, did then and there pray the said justice, to admit and allow the said matters so produced and given in evidence for the said *Thomas Bennion*, to be conclusive evidence in favour of the said *Thomas Bennion*, to entitle him to a verdict, and to bar the said *James Harrison* of his said action, against the said *Thomas Bennion*, and to direct the jury accordingly. But to this, the said counsel learned in the law of the said *James Harrison*, did then and there insist before the said justice, that the same were not sufficient, nor ought to be admitted or allowed to entitle the said

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 Goods
against
HARRISON.

1821.

Goode
against
HARRISON.

Thomas Bennion to a verdict, and to bar the said *James Harrison* of his said action against the said *Thomas Bennion*, and thereupon, the said justice stated his opinion to the jury to be, that a fraud had been committed by the said *John Goode*, and that where one of two innocent parties was to suffer, he ought to do so whose negligence occasioned the loss. That an infant may, in point of fact, be a partner, and sue as a partner on a contract, though he is not liable to the partnership creditors. That in April, 1818, the said *Thomas Bennion* held himself out as a partner with the said *John Goode*, and to the said *James Harrison* in particular, and that after he came of age, in May, 1818, he should have given notice of his dissent to the said partnership, or that he would be no longer liable as a partner, which he might easily have done. That he knew, he would be supposed by the said *James Harrison* still to continue a partner, and that he was negligent in not putting a stop to that delusion. That if an infant, shortly before he becomes of age, represents himself as a partner, he ought to take care to notify, that he is not so when he comes of age, as he facilitates the commission of a fraud. That though the payment, after the infant came of age, was not sufficient to confirm the partnership, yet as there was in this case an actual partnership between the said *John Goode* and the said *Thomas Bennion*, and inasmuch as the said *Thomas Bennion* might have prevented the said *James Harrison* from being deceived, if he had given notice of his dissent to the partnership, or that he would be no longer liable as a partner, he ought to be liable to the said *James Harrison*, and that in effect, by his omission to do so, he suffered the said *John Goode* to pledge his, the said *Thomas Bennion's* credit

credit to the said *James Harrison* after he came of age, and, with that direction, left the same to the said jury, and the said jury then and there gave their verdict for the said *James Harrison* for, and assessed the aforesaid damages at 18*l.* 18*s.* damages. Whereupon the counsel for the said *Thomas Bennion* excepted to the aforesaid opinion of the said justice, and did insist on the several matters and things aforesaid, as a bar to the said action, and that an infant cannot be a legal partner, and that, when the said *Thomas Bennion* came to the age of 21 years, there was no necessity for him, nor was he bound by the law to give notice of his dissent to the partnership, or that he would be no longer liable as a partner, in order to avoid the liability of a partner. And that, as the said *Thomas Bennion*, in *April*, 1818, was an infant, he was not a legal partner, and therefore, no notice was necessary to be given by him of his dissent to the partnership, or that he would be no longer liable as a partner, and inasmuch as the said several matters, so produced and given in evidence on the part of the said *Thomas Bennion*, and objected and insisted on as a bar to the said action, do not appear by the record of the verdict aforesaid, the said counsel for the said *Thomas Bennion* did then and there propose their aforesaid exceptions to the opinion of the said justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said *Thomas Bennion* as aforesaid, according to the form of the statute in such case made and provided, and thereupon the said justice, &c.

1821.

Goode
against
HARRISON.

Little-

1821.

Goods
against
Harrison.

Littledale, for the plaintiff in error. In this case *Bennion* was not liable : he can only be liable as a partner, not having himself personally interfered in ordering the goods. Now, admitting that what passed with *Fair* at *Manchester* was sufficient to make him liable as a partner, in case he had then been of age, it is clear here that no act has been done by him since his coming of age to affirm the partnership ; and the case ought not to have been left to the jury, as if it was the duty of the infant, upon coming of age, to disaffirm the partnership. In *Holmes v. Blagg* (*a*), it was a question arising out of a lease. Now, a lease may be for an infant's benefit, and an interest passes by it ; and, therefore, it is for him to disaffirm it after he comes of age, or otherwise it will bind him. But a partnership is, in contemplation of law, not for his benefit ; and, therefore, if nothing be done after he comes of age to affirm it, it is at an end. An infant cannot be a bankrupt. His trading is not a thing recognized by the law ; and it cannot, therefore, be necessary for him to give a regular notice to the creditors that such a trading has been put an end to ; nor will the law presume that he commits a fraud in not doing so. In *Jennings v. Rundall* (*b*), the infant was held not to be liable ; because, although the action was framed in tort, it was in reality founded on a contract. An infant is indeed liable to an action for slander, assault, or any thing connected with crime ; but not for any thing founded on a contract. Now, in order to make out the partnership, certain contracts are proved : for each of these acts, separately, the infant is not

(*a*) 1 *B. Moore*, 466.(*b*) 8 *T. R.* 335.

respon-

responsible. How, then, can the partnership, which is the aggregate of these acts, be binding upon him?

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against
HARRISON.

Parke, contra. The case does not go on the ground of any supposed continuance of the contract of partnership between *Goode* and *Bennion*, after the latter came of age, but is founded on grounds altogether distinct. Here, *Bennion* permitted himself to be held out to the world as a partner, and so induced persons to believe that *Goode* had authority to bind him; and there are many cases depending upon the principle, that where an individual chooses so to act, he makes himself responsible. In *Monk v. Clayton* (a), the act of a servant, though out of place, was held to bind the master, by reason of the former credit given him by his master's service; and the same principle applies to the present case. Here, the infant was introduced as a partner; and the conversation with *Fair*, and his own letter, dated 20th April, 1819, are abundantly sufficient to shew, that up to a very short period before his coming of age, he represented himself as a partner. He must, therefore, be held responsible, upon the principle, that where one of two innocent parties is to suffer by the fraud of a third, he ought to suffer who has been the cause why the credit has been given.

/ 18

Littledale, in reply. The case of master and servant is distinguishable. There, the master had originally power to authorize the servant to contract; but the infant never could give such authority to his partner. In *Viner's Abridgement*, tit. *Enfant*, H. 2. pl. 16., it is

(a) Cited in 10 Mod. 110.

thus

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thus laid down, “ Case lies not against an infant for affirming himself to be of age, and thereby borrowing money of the plaintiffs; and a distinction was taken between torts and contracts of infants; for though infants shall not be bound by contracts, yet they shall be bound for torts. But, *per Curiam*, though infants shall be bound by actual torts, as trespasses which are *vi et contrâ pacem*, yet they shall not be bound by those which sound in deceit.” That is, therefore, a direct authority in point.

ABBOTT C. J. I am of opinion that, in the present case, the judgment ought to be affirmed. By the bill of exceptions, it appears, that at the trial it was insisted that the matters given in evidence were conclusive, and ought to have entitled the defendant to a verdict; and that the learned Judge should have directed the jury accordingly. The question now is, if the evidence so proved was conclusive, and if the learned Judge ought so to have informed the jury? I think the evidence was not conclusive, and that it was not the duty of the learned Judge so to have informed the jury. No doubt *Bennion*, whilst under 21, had been a partner, and had held himself out as such to many persons, and amongst others, to the plaintiff. Upon his coming of age, he does nothing. He indeed ceases to act as a partner, or to purchase goods; but he gives no notice to any body that he has so ceased. Then, it is insisted in his behalf, that as all he did in the character of a partner was done in his infancy, this was not necessary; and that he is not liable, unless it be affirmatively shewn that he was a partner with *Goode* after he came of age. But a person may be sued as a partner who never was in reality a

part-

partner. If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership may consider him as such, and he is bound by that representation. It is not necessary in fact, or in law, that to create a legal obligation a partnership should be still continuing. The legal obligation may arise from the acts of the party at one time, and his forbearance at another time. Here, during infancy, the defendant acts as a partner, and when he comes of age he forbears to inform the world that he was not so. Then the question is, if the Judge ought to tell the jury that it was a matter upon which they were to deliberate? I think the learned Judge acted most correctly in leaving it to their decision, and leaving it with a strong intimation of his opinion against the claim of exemption set up by the defendant. The judgment, therefore, of the Court of Common Pleas at *Lancaster* must be affirmed.

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against
Harrison.

BAYLEY J. If I had seen any ground for changing the opinion I delivered at the time of the trial, I should be very glad in having the opportunity to correct it now; but, in this case, I still think the present plaintiff entitled to recover, and that the infancy of *Bennion* was no bar to the action. It is clear that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still he may be a partner. If he is, in point of fact, a partner during his infancy, he may, when he comes of age, elect if he will continue that partnership or not. If he continues the partnership, he will then be liable as a partner; if he dissolve the partnership, and if, when of age, he takes the

1821.

Good
against
Harrison.

the proper means to let the world know that the partnership is dissolved, then he will cease to be a partner. But the foundation of my opinion is the negligence of *Bennion* at the time he became of age. Suppose an infant is not really a partner, and that, during his infancy, he never in fact enters into any joint purchase, but that he holds out to different people, "I am a partner with *A. B.*," and then comes of age. Suppose, also, that the person to whom he made the representation furnishes *A. B.* with goods, *A. B.* representing himself to be a partner with the infant, and the latter having done nothing to correct the mistake and apprehension in the mind of the seller of those goods, I should think, in such a case as that, the infant, the person who, when he was an infant, had represented himself as being a partner with *A. B.*, would, by suffering that delusion to continue when he became of age, and neglecting to set the matter right, be liable to all those persons upon whom the delusion operated. That is the justice, and, as it seems to me, the law of the case. It would be very hard if the persons who had sold the goods should not have the benefit of the credit pledged; and the individual, when he came of age, may protect himself from the consequence of that misrepresentation by giving notice to all the persons to whom he has made the false representation. For these reasons, I think the judgment ought to be affirmed.

HOLROYD J. I think, also, that the judgment ought to be affirmed. Although an infant, entering into partnership with other persons, is not responsible for the debts contracted during his infancy, while he is so a

part-

partner; yet he may by law be a partner, and be entitled to all the benefits resulting from the partnership, though he will not be liable for the losses, if he chooses to take advantage of his infancy. Here, a partnership was formed; and it appears by the letter of the 20th of April, 1818, written by the defendant himself, that that partnership continued up to that time, which was within a very short period of his attaining the age of 21. There was, I think, sufficient evidence for the jury to draw the conclusion that the partnership continued until he came of age: and if there was a partnership continuing when he came of age, that partnership must be taken still to have continued till something was done to dissolve it; and no notice being given by the infant to dissolve the partnership, all the consequences of law result from it, one of which is, that a partner of age is responsible for all the debts contracted by the firm after he came of age. I think that the defendant is liable, and that the judgment ought to be affirmed.

1821.

*George
against
Harrison*

BEST J. I am of the same opinion; and I think that the direction of the learned Judge was perfectly correct. The fallacy of Mr. *Littledale's* argument, I think, arises from this circumstance: he considers the contract of an infant as absolutely void from the beginning. But it is not void; for if void, the infant himself could take no advantage of it. It has however been decided that an infant may be a partner, and may take advantage of a partnership contract. Here, the infant, by holding himself out as a partner, contracted a continual obligation; and that obligation remains till he thinks proper to put an end to it. He continued that obligation when he became of

age,

1821.

Goode
against
HARRISON.

age, when he became capable of managing his own concerns; and if he wished to be understood as no longer continuing as a partner, he ought to have notified it to the world. Not having done so, I think that contract, which was voidable only in the first instance, became absolute as against him. I am of opinion that when he, in the month of *April*, had distinctly stated to the person to whom that letter was written, that he was not a partner in a particular transaction, but a general partner, and directed goods to be purchased for the concern, the world had a right to take him to be a partner till he thought proper to put an end to it; and if, after he became of age, he allowed that delusion to go on, inducing the world to believe that the partnership was continuing, he must, like every other man, take the consequence. It seems to me, on the principles of honesty as well as by the rules of law, this judgment ought to be affirmed.

Judgment affirmed.

1821.

PHILLIPS and Another *against* BARBER.Friday,
November 2d.

DECLARATION on a policy of insurance, in the usual form, on the ship *Susannah*, for twelve months from the 20th *February*, 1820, to the 19th *February*, 1821, both days inclusive, *at sea and in port*. The loss was alleged in the first count of the declaration as follows: And the said plaintiffs further say, that heretofore and during the continuance of the risks in the said writing or policy of insurance mentioned, and thereby insured against, to wit, on the 1st day of *October*, 1820, aforesaid, the said ship arrived at the harbour of the city of *St. John*, in the province of *New Brunswick*, and then and there discharged a certain cargo, with which the same was then stored, and loaded, and thereupon it then and there became necessary to take and place, and the said ship was then and there accordingly taken and placed in a certain graving-dock there, in order that the same might be repaired and amended, and rendered fit to proceed on her then intended voyage. And the said plaintiffs further say, that the said ship was then and there placed near to a certain wharf in the said graving-dock, and that afterwards, and during the continuance of the risks in the said policy of insurance mentioned, to wit, on, &c., and whilst the said ship was lying against the said graving-wharf, so placed there as aforesaid, the same, by the violence of the wind and weather, was with great force and violence blown over on her side, whereby the said

Where, in an action on a policy of insurance on ship, in the usual form, for twelve months, at sea and in port, the loss averred was as follows; that the ship having arrived at the harbour of *St. J.*, and discharged her cargo, it became necessary to place her, and she was accordingly placed, in a graving-dock, there to be repaired, and near to a certain wharf in the graving-dock; and that, whilst she was there, by the violence of the wind and weather she was thrown over on her side, whereby she struck the ground with great violence, and was bilged, &c.: Held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes, &c." for which the underwriters were liable.

Held, also, that the above facts, with the additional circumstance of there being two or three feet water in the graving-dock when the accident happened, did not amount^{to} to a loss by perils of the sea.

1821.

PHILLIPS
against
BAKER.

CASES IN MICHAELMAS TERM.

ship was thrown upon and struck the ground with great violence, and thereby, then and there was bilged, strained, shattered, and greatly injured, damaged, broken, and spoiled, and it, thereupon, then and there became expedient and necessary to sell and dispose of the said ship, and same was then and there accordingly sold at the said port of St. John aforesaid, and by means of the premises aforesaid, the said Daniel Phillips sustained an average loss, to wit, an average loss of 764*l.* 6*s.* 6*d.* upon and in respect of the said ship, to wit, at, &c., and thereby, and according to the form and effect of the said policy of insurance, and his promise and undertaking, the said defendant then and there became liable to pay and ought to have paid to the said plaintiffs a certain sum of money, to wit, the sum of 84*l.* 18*s.* 6*d.* of like lawful money, being his the said defendant's proportion of the said average loss for and in respect of the said sum of 100*l.*, so by him insured as aforesaid. The second count alleged the loss by perils of the sea generally. To the first count, the defendant demurred specially, assigning for cause of demurral that it was not stated that the ship was at sea or in port when the loss thereof happened, and that the nature of the said graving-dock was not stated, nor did it appear whether, at the time of the loss, the ship was in water or on dry ground, nor that the loss happened from any peril insured against by the policy, no city of St. John, nor how it was necessary to the said ship might not have been repaired at the same, nor how much the sale thereof produced that the loss, as stated, was in its nature not a but a total loss, with benefit of salvage to be had and was alleged without sufficient cause.

precision. And as to the other count, he pleaded the general issue.

1821.

 PHILIPS
against
BARBER.

Campbell, in support of the demurrer. This was not a loss for which the underwriters were liable, being a mere accident, happening to the ship whilst under repairs. The loss is clearly not one of the perils enumerated in the policy. Nor will the general words at the end be sufficient to include the case; for those words apply only to perils ejusdem generis with those enumerated. Suppose the ship damaged by worms, or that rats made holes in the bottom, and so the loss happened; it is clear, that in such cases, the underwriters would not be liable. In *Thompson v. Whitmore* (a), the loss alleged in the declaration was by the waves, winds, and perils of the sea. And, in truth, the waves there actually caused the loss; for they washed away the supports of the vessel, in consequence of which she was damaged. But the Court there held it not to be a loss by perils of the sea. On that occasion, the case of *Rowcroft v. Dunsmore* was cited and relied on, where Lord Kenyon held, that a loss occasioned by the ship's not being able, when hove down, to bear the strain, and in consequence, being drawn on the land, where she bilged, was not a loss by perils of the sea. He also cited *Pelly v. The Royal Exchange Assurance Company*. (b) Besides, it is not distinctly alleged that this loss happened in port.

Chitty, contra, was stopped by the Court.

ABOTT C. J. I am of opinion, that the plaintiff is entitled to recover. In this case he has not entangled

(a) 3 *Tenn.* 227.(b) 1 *Burr.* 341.

1821.

*PHILLIPS,
against
BARKER.*

himself by any particular allegation, but has shewn fully the manner, time, and place of the loss. This, it is to be observed, was a policy upon the ship for time, at sea and in port. Now, the loss stated in the declaration was, that after the ship had discharged her cargo at the harbour of *St. John*, she was then and there placed in a certain graving-dock there, for the purpose of repair, near to a certain wharf, and that whilst she was lying there, she was, by the violence of the wind and weather, blown over on her side, and damaged, so that it became necessary to sell her. Now, I think that it is clearly alleged that this was a loss happening in port. And then the question will be, whether it is a loss falling within any of the perils insured against. Now, the perils insured against are of the seas, men of war, fire, &c., and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship. These general words are, indeed, restrained in construction to perils *eiusdem generis* with those more particularly enumerated in the policy. In this case, however, the loss was occasioned by the violence of the wind and weather in port; and it seems to me, therefore, to have been produced by a peril *eiusdem generis* with those specified, and to fall within the general words of the policy. There must, therefore, be judgment for the plaintiff.

Judgment for the Plaintiff.

On the first day of term, *Scarlett* moved to enter a verdict for the plaintiff on the second count, averring a loss by the perils of the sea. The facts given in evidence at the trial were the same as those stated in the first count of the declaration, with the addition, that there was between two and three feet depth of water in

in the graving-dock at the time the ship was blown over. He cited *Fletcher v. Inglis*, (a) as an authority in point. But the Court were of opinion, that this was not a loss by the perils of the sea; and they added, that the case cited was clearly distinguishable; for the ship there was in the ordinary course of her voyage when the damage happened, which was not the case here.

1821.

 PHILLIPS
against
BARNETT.

Rule refused.

(a) 2 B. & A., 315.

MURRAY against KING.

Friday,
November 2d.

DEBT on bond. The defendant craved oyer of the bond and condition, which recited, that *W. B. Tufnell* and the defendant had delivered and indorsed to the plaintiff (who had discounted the same) a bill of exchange, drawn by *Tufnell* on, and accepted by, one *Tyrell*, dated January 14th, 1819, for the sum of 1300*l.*, payable 12 months after date, for value received, and payable to *Tufnell*, or his order; and it then provided, that if *Tufnell* and the defendant, or either of them, their heirs, &c. should pay or cause to be paid to the plaintiff, his executors, &c. the said sum of 1300*l.*, within one month after the said bill of exchange should become due and payable as aforesaid, in case the said sum of 1300*l.* should not be then paid by *Tyrell* to the

The condition of a bond, after reciting that defendant and *J. S.* had delivered and indorsed to the plaintiff a bill of exchange, drawn by *J. S.* and accepted by *A. B.*, was, that defendant and *J. S.*, or either of them, their heirs, &c. should pay, or cause to be paid, to the plaintiff, his executors, &c. the sum secured by the bill, within one month after it should become due and payable,

able, in case it should not be then paid by the acceptor, to the plaintiff, his executors, &c., according to the tenor of the said bill, together with interest from the time the bill became due: Held, that to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and *J. S.*, or either of them.

M. S

plaintiff,

1821.

~~MURRAY
against
King.~~

plaintiff, his executors, &c. according to the tenor of the said bill of exchange, together with interest for the same from the time that the said bill of exchange should have become due and payable, then the obligation should be void, &c. The defendant pleaded, first, non est factum; secondly and thirdly, that the bond was given for an usurious consideration, upon which pleas issues were joined; and, fourthly, that the plaintiff, when the bill of exchange in the bond mentioned became due and payable, did not duly present, or cause to be presented, the said bill of exchange to *Tyrell*, for payment thereof, according to the usage and custom of merchants, but wholly neglected to present the said bill for payment for a great and considerable time, to wit, until one month had elapsed after the said bill of exchange became due and payable, according to the tenor thereof; and, fifthly, that after the bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. the said bill was presented to *Tyrell* for payment thereof, and payment required, but that *Tyrell* neglected and refused to pay the same, and that the plaintiff did not give, or cause to be given, notice of the non-payment of the bill to the defendant, or to *Tufnell*, in a reasonable time after the bill became due. To the fourth plea, the plaintiff replied, that the acceptance of the bill of exchange by *Tyrell* was a forgery; and that the defendant and *Tufnell*, long before the said bill of exchange became due, to wit, on, &c. well knew that it was so; and that, by reason of the premises, the said bill of exchange was not presented and shewn to *Tyrell* for payment thereof, and payment of the said sum of money therein specified

was

was not required. There was a similar replication to the fifth plea. To these replications, the defendant rejoined, that he did not, before the said bill of exchange became due and payable, know of the forgery of *Tyrell's* acceptance. Demurrer and joinder.

1821.

MURRAY
against
KING.

Campbell, in support of the demurrer. The pleas are insufficient; for they do not allege that the condition of the bond has been performed, but, on the contrary, admit that it has been broken. The only qualification in the condition is, in case the sum of 1300*l.* shall not be paid within one month after the bill of exchange shall become due. The contract therefore was, that the acceptor should have a month to pay the bill: and if then not paid, that the obligees of the bond would pay it. It is clear that it was competent for the parties to waive the necessity of any presentment, which, in fact, they have done. If, indeed, it had been a special acceptance, perhaps the words, according to the tenor of the said bill, might have required a presentment; but it does not appear that this was so. The pleas only state non-presentment; they do not say due diligence was not used, or that the drawer or indorsers were thereby discharged, which ought, at all events, to have been done. The case of *Warrington v. Furbor* (a) is a direct authority for the plaintiff.

Chitty, contra. The authority of *Warrington v. Furbor* is doubtful, after the case of *Philips v. Astling* (b), which, to a great extent, overruled it. Here, the obligees are bound to pay the bill, in case it be not paid by the ac-

(a) 8 East, 242.

(b) 2 Taunt. 206.

1821.

MURRAY
against
KING.

ceptor, according to the tenor and effect of the said bill of exchange. Now, those words include the necessity of presentment; for they shew that the ordinary course of mercantile dealings is to be followed; and part of that course is, to present the bill for payment to the acceptor, and, in case of dishonour, to give notice to the other parties to the bill. How is the acceptor to pay it, unless it be presented to him? For he cannot tell who is the holder, till it is so presented. The pleas, therefore, are sufficient.

ABBOTT C. J. I am of opinion that the plaintiff is entitled to recover. Here, the condition, after reciting that *Tufnell* and the defendant had delivered and indorsed to *Murray* a bill of exchange, drawn by *Tufnell* and accepted by *Tyrell*, provided, that the bond shall be void in case they, or either of them, should pay the amount of the bill within one month after it became due, in case it should not be then paid by the acceptor. Now, all this, in substance, amounts to an undertaking to pay the bill, with interest, within one month after it was due, if not then paid by the acceptor. It is admitted that that month had elapsed, and that it has not been paid by the acceptor, according to the condition of the bond; therefore the defendants are answerable. It is, however, contended by the defendant's plea, that we are to engrave upon this bond those limitations which the law imposes upon the holders of bills of exchange, namely, a due presentment to the acceptor, and a notice of dishonour to the drawer and indorser. I am of opinion that we ought not so to do. I do not rely on the case of *Warrington v. Furbor* (a); because that case

(a) 8 East, 242,

has

has been broken in upon by the case of *Philips v. Astling*. But there is a main distinction between those cases and the present; for, in both of them, the guaranties were given by persons not interested as parties to the original instrument. But, here, the bond is given by *Tufnell* and the defendant, who were both parties to the bill. Now, in that character, if no bond had been given, it is clear they would have been liable, in case the formalities stated in the pleas had been complied with; and if the only object of the bond had been to give the plaintiff a security of a higher nature, and to make the party liable in case those formalities had been complied with, I think we should have found it so expressed in the condition; and not finding that, I therefore conclude that the parties meant to engage to pay the bill at all events, as sureties for the acceptor, in case he did not pay it; and if so, it is clear that the pleas are insufficient, and, therefore, there must be judgment for the plaintiff.

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*MURRAY
against
King.*

BAYLEY J. I have had considerable doubts in the course of this argument; but my mind has at length come to the conclusion that the pleas are bad, and that the plaintiff is, therefore, entitled to recover. In this case, *Tufnell* and *King* were the drawer and indorser of the bill of exchange; and the condition is, that if the bill be not paid when due, for the payment of which by the acceptor they have become sureties, they would pay, or cause to be paid, the bill within one month after it became due, and was not paid by the acceptor. It is, therefore, conditioned for their own acts, in case of a given event, namely, the non-payment by the acceptor. Now, the acceptor has not paid the bill in money, nor have *Tufnell* and *King* done so. The bond, therefore, is for-

1821.

~~Monkhat
against
King.~~

forfeited, unless the neglect to present the bill to the acceptor, and the want of notice to the other parties, be considered by the Court as an equivalent to actual payment. Now, I think this was not the intention of the parties to this bond. If no bond had been given, laches on the part of the holder would have exonerated *Tufnell* and the defendant; and one object of the bond might, therefore, have been to exonerate the plaintiff from such a risk. It was very easy for *Tufnell* and *King* to ascertain, by enquiry, whether *Tyrell* had paid the bill; and I think the fair meaning of the words in this condition was, to throw upon them this obligation.

HOLROYD J. I think that the pleas are bad. By the condition of the bond, it appears that it was given by persons who were parties to the original instrument, and who would have been answerable, independently of the bond, in case the custom of merchants had been properly acted upon, namely, by a due presentment and notice of dishonour. Under these circumstances, the bond was executed; and the only event specified in the condition, upon which the money was to be paid by *Tufnell* and the defendant, is, in case the money is not paid by the acceptor, according to the tenor of the bill. Now, non-payment by the acceptor, even without presentment, is non-payment, according to the tenor of the bill; for a presentment is not a material ingredient to entitle a party to maintain an action against the acceptor. He may, perhaps, plead as a defence, that he was always ready to pay the bill, and that as soon as he knew who was the holder of it, he tendered the money; but a plea, that the bill was not presented to him, would be no discharge. Here, *Tufnell* and the defendant, in

case

case no bond had been executed, would have been discharged by the want of notice of dishonour. The condition, however, is totally silent as to notice, as the only event there mentioned is non-payment by the acceptor. I am of opinion, that here there was no payment by the acceptor, either in fact or in law; and, therefore, that the defendant still remains liable on the bond.

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MURRAY
MURRAY
King.

BENJ. concurred.

Judgment for the plaintiff.

WALKER against MAITLAND.

Saturday,
November 3d.

A RULE nisi having been obtained, in Hilary term last, for setting aside the award in this case, the Court, on cause being shewn, ordered the award to be stated in a case for their opinion. The material facts stated on the face of the award were the following: The plaintiff, being owner of the ship *Britannia*, by a charter-party, bearing date the 5th day of October, 1818, chartered her to *James Wildman* to proceed to the *West Indies*, there to load a cargo of colonial produce, and to bring home the same to this country. By the usage of trade in that behalf, the risk of bringing colonial produce in the *West Indies* from shore to the ships in which the same is to be conveyed home to *England*, is borne by the owners of ships, unless specifically agreed to the contrary. The plaintiff, to indemnify himself against such risk, with respect to loading the *Britannia* in the said voyage, on the 24th April, 1819, effected a policy

The under-writers on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners.

of

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WALKER
against
MAITLAND.

of insurance in the common printed form on boats belonging to the ship *Britannia*, and on produce in said boats, or in any other craft employed in loading the ship during her stay at *St. Kitts*. The defendant, by his agent, subscribed the policy for 200*l.* The ship *Britannia* arrived at *St. Kitts*, on the said voyage, on the 6th day of *January*, 1819. She was manned with a competent crew, had they conducted themselves with propriety, and done their duty in loading the ship. On the 16th day of *April*, 1819, while the ship lay at *St. Kitts* to take in her cargo, a certain sloop, called the *Vigilant*, was employed as a craft on behalf of the said plaintiff, to bring produce from a place in the island called *Red Flag Bay* to the ship, then lying at the distance of fifteen miles therefrom. The sloop having received a full loading of sugar, to be carried on board the ship, proceeded from *Red Flag Bay* about six in the morning for the ship, in charge of the chief mate and three seamen belonging to the ship, and four negroes, labourers. The sloop was sufficiently manned; and if the mate and the other persons had done their duty, the sloop, with the produce on board thereof, would have safely reached the ship. About eight in the evening the mate lay down to sleep, leaving the charge of the watch to one of the seamen, another having the helm; and soon after the mate went to sleep, the whole of the watch on duty went to sleep also. The sloop being left to herself, ran ashore, and was beat to pieces, whereby part of her loading was lost, and the residue damaged. The loss arose and happened from the misconduct and negligence of the persons so on board the sloop. On the 17th *April*, while the ship was at *St. Kitts*, for the

purpose

purpose aforesaid, four seamen of the ship were sent ashore by the master in the long boat of the ship to bring on board a hogshead of sugar, then lying on the beach, and, having put the hogshead of sugar into the boat, by their mismanagement the boat was driven on the beach and wrecked, and the hogshead of sugar was entirely washed out. If the boat's crew had done their duty, the boat would have safely reached the ship with the hogshead of sugar; and the loss thereof arose from the misconduct and negligence of the boat's crew. Upon these facts the arbitrators awarded in favour of the plaintiff.

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 WALKER
against
MAITLAND.

Campbell, for the plaintiff, relied upon *Busk v. The Royal Exchange Assurance Company* as an authority in point. (a)

Pollock, contra. Here the loss has happened in consequence of the negligence of the crew, who are the servants of the plaintiff, and not by perils of the sea. This is, therefore, in point of law, a loss happening from the negligence of the assured himself; and, therefore, the underwriters are not liable. In *Gregson v. Gilbert* (b), it was held, that where a loss happened by a mistake of the master, it could not be considered a loss by perils of the sea. And *Buller v. Fisher* (c) is to the same effect. In this case, too, there was a breach of the implied warranty to provide a master and crew of competent skill. For here they were not sufficiently

(a) 2 B. & A. 73.
(c) 3 Esp. 67.

(b) *Marshall on Insurance*, 690.

vigilant,

1821. vigilant; and, in consequence of that, the loss happened. *Tait v. Levi.* (a)

WALKER
against
MAITLAND.

ABBOTT C. J. I am of opinion that the plaintiff is entitled to recover. The subject of this insurance was very special; it was on boats belonging to the ship *Britannia*, and on produce in the said boats, or in any other craft employed in loading the ship during her stay at *St. Kitts*. No doubt the owner, under this policy, expected to be indemnified against the loss in question. The words of the policy are very large, and, although it may appear extraordinary, that the underwriters should undertake to indemnify the assured against the negligence of the master and crew, which is a species of misconduct on their part, yet it is clear, that they do so in the case of barratry, which is the highest species of misconduct of which the master and crew can be guilty. In this case, the immediate cause of the loss was the violence of the winds and waves. No decision can be cited, where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions, as to the quantum of care which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy, in that case it might be argued, as here, that the loss was imputable to the neg-

(a) 14 *East*, 481.

ligence

ligence of one of the crew, and that the underwriters were not liable. These, and a variety of other such questions would be introduced, in case our opinion were in favour of the underwriters. I cannot distinguish this case from that of *Busk v. The Royal Exchange Assurance Company*; there, the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the underwriters were held to be liable. Here, the winds and waves caused the loss, but they would not have produced that effect, unless there had been neglect on the part of the crew. I think that the underwriters are liable for the loss that has arisen in this case.

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BAYLEY J. Here, the loss arose from the sloop with the goods on board having been beat to pieces by the force of the winds and waves; and the question in this case is, whether the underwriters are exonerated from the loss, by proving negligence on the part of the crew, although the damage was occasioned by the perils of the sea. It is the duty of the owner to have the ship properly equipped, and for that purpose, it is necessary that he should provide a competent master and crew in the first instance; but having done that, he has discharged his duty, and is not responsible for their negligence, as between him and the underwriters. If that were not considered to be the law, the question must have frequently arisen, whether there had been proper care and attention by the master and mariners. It is now, however, raised almost for the first time. I am of opinion, that in this case the underwriters are liable.

Hol.

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against
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HOLROYD J. The rule of law is, that proxima causa non remota spectatur, and here the proximate cause of the loss was the peril of the sea. The question is, whether the underwriters are liable for a loss proceeding directly from a peril of the sea, but remotely from the negligence of the crew. The underwriters engage to be responsible for the barratry of the master; they therefore engage to be responsible for the highest species of misconduct. This case cannot be put on the ground of the breach of the implied warranty to provide a master and crew of competent skill. It is sufficient, if the owners provide a master and crew generally competent; there is no implied warranty that such a crew shall not be guilty of negligence. I therefore agree with the rest of the Court, that the rule for setting aside the award must be discharged.

Rule discharged. (a)

(a) Best J. was absent at Chambers.

Saturday,
November 3d.

The KING *against* The Inhabitants of HARDWICK.

A pauper, being eighteen years of age, residing with his father, was drawn as a militia man, and served for five years as a ballotted man. During his service, he several times, when on furlough, and, finally, after his discharge from the militia, returned to his father's house: Held, that by his so remaining separated from his father's family after twenty-one, he was emancipated, although the original separation was not voluntary on his part.

wick,

wick, and resided there as a part of the family of his father, who was a settled inhabitant of that parish. In the year 1817, when the pauper was 18 years of age, he was drawn for the *Oxfordshire* militia, and served therein for five years as a ballotted man; the regiment during the whole of that period, being embodied and in actual service. He joined the regiment in 1808, and in the year 1809, having obtained a furlough for three weeks, he returned to the house of his father, who was still residing at *Hardwick*, and lived with him for about a fortnight. In the year 1811, the pauper obtained a second furlough for a fortnight, and went again to his father's, who had removed to, and was then residing in the parish of *Stanton Harcourt*, where he remained for about twelve days. The pauper was discharged from the militia in the year 1813, when he returned to his father in *Stanton Harcourt*, who gave him lodgings in his house till his marriage. After the pauper's return from the militia, and before his marriage, his father gained a settlement in *Stanton Harcourt*.

Cross, in support of the order of sessions. The pauper by remaining after twenty-one, separated from his father's family, became emancipated: *Rex v. Cowhoneyborne* (a), *Rex v. Roach*. (b) And consequently the subsequent settlement of his father was not communicated to him. He was then stopped by the Court.

Bligh, contra. All the cases which have hitherto been determined on the subject, as to the emancipation by separation, are cases in which the separation was volun-

(a) 10 *East*, 88.(b) 6 *T. R.* 247.

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tary at first on the part of the child. That was so in *Rex v. Cowhoneyborne*, and in *Rex v. Roach* there is this distinction also, that there the separation commenced after the child attained twenty-one. Those cases, therefore, do not go so far as the present. In *Rex v. Walpole St. Peter's* (*a*), and in *Rex v. Stanwix* (*b*), which are more similar, the distinction is, that there the paupers voluntarily enlisted as soldiers. But here, the original separation was under the controul of the law, by the pauper being ballotted as a militia man. This therefore is like the case of an arrest before twenty-one and continuance in prison till after, under which circumstances it could not surely be contended that the pauper would be emancipated. In *Rex v. Broadhembury* (*c*), a separation by force of law in a workhouse was held no emancipation, and *Rex v. Woburn* (*d*) shews, that the circumstance of being in the militia is not alone an emancipation. The original separation being therefore in this case compulsory, the pauper's settlement will follow that subsequently gained by his father, and the order of sessions is therefore wrong.

ABBOTT C. J. The rule of law is, that every new settlement acquired by the parent is communicated to the children so long as they remain members of his family; and the question in this case is, whether at the time when the father gained his settlement in *Stanton Harcourt*, this pauper remained a member of his family. Now, during the minority of the child, he will remain almost under any circumstances unemancipated; but

(a) *Burr. S. C.* 638.

(b) *5 T. R.* 670.

(c) *2 Bott.* 39.

(d) *8 T. R.* 479.

where

where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated unless in fact the child continues part of the family. Where therefore, at that period he is absent, employed in gaining a livelihood for himself, or serving as in this case, in the militia, I think he no longer remains a member of the family. In the present case, I think that the sessions have come to a right conclusion, in deciding that the last legal settlement of the pauper was at *Hardwick*.

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—
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of
HARDWICK.

BAYLEY J. I am of the same opinion. If a child be separated from his father's family, and does not return till after twenty-one, he ceases to be a member of that family, and consequently his settlement will not after twenty-one, shift with that of his father. I think, therefore, that the sessions are right, and that this case is hardly distinguishable from *Rex v. Walpole St. Peter's*.

HOLROYD J. I am of the same opinion. The distinction between a compulsory and a voluntary separation seems to me to be immaterial. The case must follow the same rule as *Rex v. Walpole St. Peter's*.

Order of sessions confirmed. (a)

(a) Best J. was absent at Chambers.

1821.

Saturday,
November 2d.

The KING *against* SEVILLE and Others.

A constable apprehended an offender for a misdemeanor committed in his presence in a place of religious worship, and carried him before a magistrate, and was bound over by recognizance to prosecute him for the offence : Held, that the expences of such a prosecution were not monies expended by him in doing the business of his township, and that he could not charge them in his accounts under 18 G. 3. c. 19. s. 4.

THIS was an appeal by the defendants, who were overseers of the poor of the township of *Quick*, in the West Riding of *Yorkshire*, against the accounts of *John Robinson*, late constable of that township. At the trial it appeared, that on a *Sunday*, in the month of *December*, 1819, a person of the name of *William Whitehead*, being in a state of intoxication, met a young woman on the road, and on his attempting to take liberties with her, she made her escape from him, and took refuge in the chapel, where divine service was just beginning ; he followed her and behaved in an unbecoming and rude manner. In consequence of which he was taken into custody by the constable, (who was then in the chapel,) and the chapel-warden, and was the next day by them taken before a magistrate ; and they were both bound by recognizance, to prosecute him at the next *Wakefield* Sessions for a misdemeanor, which they accordingly did ; and he was found guilty, and punished by six months imprisonment. No notice was ever given to the overseers or other inhabitants, that the prosecution was intended to be carried on at the expence of the township, nor was it mentioned or approved of, at any meeting of the inhabitants. The sessions at *Wakefield*, where the indictment against *Whitehead* was tried, were held in the month of *January*, 1820, and in the *March* following, the constable regularly, and in the way pointed out by the act 18 Geo. 3. c. 19., presented his accounts of the expenses incurred by him in the discharge

charge of his office as constable; the whole of which were allowed, except the item of 18*l.* for the expenses incurred in the prosecution of *Whitehead*, the allowance of which was negatived by a large majority of the meeting of the inhabitants, held for the purpose of investigating them, upon the ground that it was not a charge which, by law, the constable could make upon the township. In consequence of this refusal, the constable duly applied to a justice of the peace, for a summons for the overseers of the poor to shew cause, why they should not pay this sum; and, upon the overseers appearing, the magistrate made an order, allowing the above sum of 18*l.*, against which order the overseers appealed. Upon hearing the appeal, the sessions confirmed the order.

1821.

The King
against
Seville.

E. Alderson and *Blackburne*, in support of the order of sessions. In this case the only question is, whether this falls within 18 G. 3. c. 19. s. 4., the preamble of which recites, that whereas constables, &c., are or may be at great charge in doing the business of their parish, township, or place, and in many cases are not sufficiently indemnified by the laws, and it then gives a power to them to charge in their accounts "all sums so by them expended on account of their parish, township, or place, in all cases not hitherto provided for by the laws heretofore made, or by this act." Now these words are very large, and are to be construed liberally in favour of a public officer. By 18 and 14 Car. 2. c. 12. s. 18., the constable's rate was created for the purpose of indemnifying him against the expenses of relieving, conveying with passes, and carrying rogues, &c. to the house of correction. By the first

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Seville.*

section of 18 G. 3. c. 19.; his expenses before magistrates, previous to committal, are provided for. Now these are the cases within the words "provided for by the laws heretofore made, or by this act." The expenses, therefore, which he is to be allowed to charge in his accounts are different from those. They must, therefore, be of the nature of those charged in this case. Here, the constable was doing the business of the township; for to preserve the peace of the township was his especial duty, and the breach of the peace was committed in his presence, and he was bound officially to interfere. That is the distinction between this case and *Rex v. Bird*; (a) There, the breach of the peace was committed in the absence of the constable, who was afterwards called in. Here, too, no individual wrong was inflicted, as there, where there was an assault. But here, what the party was taken up and prosecuted for, was an indecent brawl in the chapel, which was a general offence to all the township.

Littledale, contra, was stopped by the Court.

Abbott C. J. The difficulty in this case is, to shew that it was the business of the township to prosecute the individual, who in this case committed the offence; for, unless it be clearly made out to be the business of the township, it is impossible that the sums expended by the constable, in this case, can be said to be a charge in doing the business of the parish, township, or place, so as to bring it within the act of parliament. Now I am aware of no law which says that it is the business of a parish or township to enter into such prosecutions;

(a) 2 B. & A. 522.

and

and I am therefore of opinion, that these expenses ought not to have been allowed by the sessions.

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against
SEVILLE.

BAYLEY J. The constable, in this case, acted perfectly right in taking the offender before the magistrate, but he should have done no more. He, however, together with the chapel-warden, enters into a recognizance to prosecute, having no authority to do so. Now, before he did this, he should have considered, whether he was willing to enter into such a recognizance at his own expense; and if not, he should have endeavoured to have obtained some authority from the township, in which case it would have been different; but not having done so, I think he cannot charge these sums in his account, as monies expended on account of the township. Very mischievous consequences might arise, if the act of a constable could thus subject the township to heavy law expenses.

HOLROYD J. I am of the same opinion. The constable is entitled to charge, in his accounts, the monies expended by him in his office, on account of the township. In this case, his duty was completely at an end, when he had carried the offender before a magistrate; and to prosecute, and to be bound over by recognizance to do so, was no part of his duty. In this respect, however, he chose to submit to the authority of the magistrate, and permitted himself to be bound over. But that act is not binding on the township. I am clearly of opinion, that these charges do not fall within the act of parliament, and that the sessions did wrong in allowing them.

Order of sessions quashed. (a)

(a) Best J. was absent at Chambers.

1821.

*Monday,
November 4th.*

The KING against The Inhabitants of ALNWICK.

An order of removal was dated 1st *August*, 1814, and an order of suspension indorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and indorsement was, in 1814, served upon the appellants, but the original order not produced at the time of serving such copy; and, subsequently, in 1815, another part of the order and indorsement executed by the same Justices, but bearing date in *August*, 1814, was served upon the appellants. The pauper was not removed till 1819, when an appeal was duly entered: Held, that the services of the original order of removal in 1814 and 1815 were both defective, and that the appeal was made in time, notwithstanding

49 G. 3. c. 124.
s. 2.

TWO justices, by their order, dated the 6th *August*, 1814, removed *Margaret Walker*, a pauper, from the parish of *Alnwick*, in *Northumberland*, to the parish or parochial chapelry of *Haydon*, in the same county. On an appeal against this order at the *Michaelmas* sessions in 1820, it was discharged, subject to the opinion of this Court upon the following case: The pauper, at the time the above order, dated 6th *August*, 1814, was made, was extremely ill, and in such a state of health, that she could not be removed without danger; the execution of the order was, therefore, suspended by an indorsement thereon in the usual form. On or about the 6th *September*, 1814, a copy of the said order of removal and indorsement was delivered to and served upon one of the overseers of the poor of *Haydon*, by a person sent and authorized by one of the overseers of the poor of *Alnwick*, such person not then having the order with him; and on the 4th *October*, 1815, another part of the original order of removal and indorsement was delivered to and served upon one of the overseers of the poor of *Haydon* by the overseers of the poor of *Alnwick*. This last-mentioned document, so served on the 4th *October*, 1815, had not been executed by the removing justices on the 6th *August*, 1814, but was executed by them in *September* 1815. It, however, bore date the 6th *August*, 1814. The order originally executed was not at any time shewn to any of the overscers of *Haydon*. The sus-

pension

pension of the execution of the said order, on account of the sickness of the pauper, was taken off in *August*, 1819, and a further order was then indorsed by the justices on the order of removal for the payment, by the overseers of *Haydon*, to the overseers of *Alnwick*, of the sum of 161*l.* 17*s.* 5*d.*, being the charges proved upon oath to have been incurred by the suspension of the order of removal. On the 5th of *September*, 1820, the pauper was duly removed from *Alnwick* to *Haydon*, and an appeal against the order of removal was entered at the *Michaelmas* sessions, 1820. When the case was called on, and the facts above stated had been proved, it was contended, on the part of the respondents, that the appellants could not be heard, as they had omitted to appeal against the order of removal within the time allowed by law: the 49 G. 3. c. 124. s. 2., enacting, that when the execution of any order of removal shall be suspended, the time of appealing against such order shall be computed according to the rules which govern other like cases from the time of serving such order, and not from the time of making such removal under and by virtue of the same. The Court, however, permitted the case to proceed, and the appeal was allowed.

1821.

The Kno
against
The Inhabit
ants of
Alnwick.

Marryat, in support of the order of sessions. The question in this case is, whether the appellants were too late in making their appeal. This depends on the 49 G. 3. c. 124. s. 2. which enacts, that when execution of any order of removal shall be suspended, the time for appealing against such order of removal shall be computed according to the rules which govern other like cases from the time of serving such order, and not from the

time

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against:
The Inhabitants
of Alnwick.

time of making such removal, under and by virtue of the same. The question, then, is, when was the order served? It clearly was not served in September, 1814, for that was an insufficient service of a copy only, without shewing the original. Nor was the second service good; for that was not a duplicate, the original having been executed in 1815, by the magistrates, without any fresh examination or enquiry. It was nothing more than a copy. Then there was no valid service till the removal took place; and in that case the appeal is in time.

Littledale contra. It must be admitted, that the first service was insufficient; but the second was valid. The date of an order is immaterial. In *Rex v. Brimpton* (a), it was in blank, and yet the order was held to be good. The mere circumstance, therefore, that this, which was executed in October, 1815, was antecedently dated, will not vitiate it. It was, therefore, an original order, which may be defined to be an order coming from the proper authority. It was not necessary that the magistrates, who were perfectly well acquainted with the case, should hear the same facts proved over again. Then, if so, the appeal should have been in 1816, and is now too late.

ABBOTT C. J. The objection made here to the judgment of the Court of Quarter Sessions, is, that they have allowed this appeal, when in point of law the appellants were not entitled to it, not having appealed within the time allowed by law. That question depends entirely

(a) 2 N. & L. 184.

upon

upon the validity of the service of the order. Now, that service, in order to be valid, must be either by delivery of the order itself, or by leaving a copy of the order, and at the same time producing the original. It is admitted, that the service in 1814 was defective; but then in 1815 there was a second service. Now, if that was the service of a copy, it was bad, for the same reason as vitiated the previous service. It is, however, contended, that this was the service of a new original order. But if we were to hold that to be so, we should, as it seems to me, give to it an effect not intended by the justices who executed it; for if they had intended it as a new order, they would have given to it a date corresponding with the time of its execution. I think that they never could have intended it as a new order, but only as an authenticated copy of their former order; and that the Court of Sessions were right in so treating it. In that view of the case, it is clear that both services are defective, and, consequently, that the appeal was in time, and the order of Sessions is therefore right,

Order of Sessions confirmed.

DAVEY and Others *against* PRENDERGRASS.

*Tuesday,
November 5th.*

DECLARATION in debt on a surety bond, executed by the defendants, conditioned for the payment within one month after demand of such balance, not exceeding the sum of 500*l.* as upon the settlement of accounts between the plaintiffs and *Samuel Prendergrass* and *James Peter Prendergrass*, should appear to be due from the latter to the former for coals, to be delivered

It is not any
defence at law,
to an action on
a bond against
a surety, that
by a parol
agreement time
has been given
to the principal.

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livered by them to the said S. and J. P. *Prendergrass*. Breach, non-payment of the said sum after demand. The defendants craved oyer of the bond, and pleaded, first, non est factum, and second, a special plea in bar, that the plaintiffs had, by parol agreement, without the privity of the defendants, given time to the principal debtors to pay by instalments, and had taken a warrant of attorney to pay, by monthly instalments of 100*l*. each, a balance of 1099*l*. 9*s*., found to be due from the latter to the former, upon an adjustment of accounts for coals sold and delivered, with a power of issuing execution, in case of default of payment of any one instalment when due. To this last plea there was a demurrer and joinder in demurrer.

W. H. Maule, for the plaintiff. The question in this case is, whether giving time to the principal is a defence at law to an action on a bond against the surety. There are a great variety of authorities which no doubt may be cited, where, in bills of exchange, giving of time to the acceptor, will discharge the drawer: and so also in cases of bail, giving time to the principal discharges the bail; but no case can be found in which such a defence has been pleaded to a bond. In *Donnelly v. Dunn* (*a*) it was held, that bail cannot plead the bankruptcy and certificate of their principal, to an action of debt upon a recognizance of bail; and in *Bulteel v. Jarrold* (*b*), which was a similar action of debt, the defence pleaded was, time given to the principal, to which there was a demurrer; and in the Court of Exchequer, judgment was given for the plaintiff, on the ground that this

(*a*) 2 *B. & P.* 45.

(*b*) Not reported.

could

could only be taken advantage of, by an application to the equitable jurisdiction of the Court, and this judgment was successively affirmed, both in the Exchequer Chamber and in the House of Lords. In giving relief on bail-bonds, the Courts proceed on the equitable jurisdiction given them by statute 4 and 5 Anne, c. 15. s. 20.; but that is not done by plea, but by summary application to the Court. Suppose an action of debt on bond, brought for the benefit of an assignee, in the name of the obligee, and a plea of a release by the obligee, the Court might, perhaps, on a proper case being laid before them, order the plea to be taken off the file, but they would not allow the facts, if replied, to be a sufficient answer to the plea. The cases of bills of exchange depend entirely on the law-merchant, and are quite distinguishable. *Burke's* case, mentioned in *English v. Darley* (a), was a case in equity. The practice of granting injunctions in courts of equity, in these cases, is also an authority to shew, that this is not a good defence at law, and no such plea as the present can be found in any of the books of entries.

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against

~~PARNELL~~

Chitty, contra. The circumstance that courts of equity have it in their power to give more extensive relief in these cases than courts of law, will satisfactorily account for the fact, that most of these decisions have been upon cases in equity; for in equity the Court can direct the securities to be delivered up. The principle, however, upon which the decisions go, applies equally to a court of law. It is to be found laid down in *Nesbett v. Smith* (b), and it is this, that where the agreement

(a) 2 B. & P. 62.

(b) 2 Bro. Ch. C. 581.

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against
PRENTRETT ABS.

with the principal alters the situation of the security, by postponing the time of payment, the surety is released from his liability. *Samuel v. Howarth* (*a*), *Law v. East India Company* (*b*), and a variety of other authorities, may be cited also to the same point. It must be admitted, that the cases in courts of common law, are questions arising, for the most part, on bail-bonds, as *Rex v. Sheriff of Surrey* (*c*), *Thomas v. Young* (*d*), *Bowfield v. Tower* (*e*), *Croft v. Johnson*. (*f*) In *Moore v. Bowmaker* (*g*), *Gibbs* C. J. says, “The principle was first adopted in the Court of Chancery, that if a creditor gives time for payment to his principal debtor, without giving notice to the surety, the latter remains no longer liable to the debt.” And he then adds, “The courts of law, in late days, have acted on the same principle in cases of bail.” So that it should seem that learned Judge treats it as a principle which could be extended properly to courts of law. Now that principle ought to be extended to this case; for otherwise the obligor and obligee might combine together to defraud the surety. In *Orme v. Young* (*h*), this very point came before *Gibbs* C. J., but was not decided. He also cited *Beadle’s* case (*i*), and *Grenningham v. Ewer*. (*k*)

ABBOTT C. J. Looking at the nature of the security in this case, it is impossible to say, that the sureties sustained any prejudice by what has taken place, for, if the first 100*l.* was not paid, immediate execution might

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| (<i>a</i>) <i>3 Meriv.</i> 272. | (<i>b</i>) <i>4 Ves.</i> 824. |
| (<i>c</i>) <i>1 Taunt.</i> 159. | (<i>d</i>) <i>15 East,</i> 617. |
| (<i>e</i>) <i>4 Taunt.</i> 456. | (<i>f</i>) <i>5 Taunt.</i> 319. |
| (<i>g</i>) <i>6 Taunt.</i> 382. | (<i>h</i>) <i>Holt, N. P. C.</i> 84. |
| (<i>i</i>) <i>3 Leon,</i> 159. | (<i>k</i>) <i>Cro. Err.</i> 396. |

have

have issued, and it could not have been set aside. The ground, however, of my opinion in this case is, that general rule of the common law which requires that the obligation created by an instrument under seal, shall be discharged by force of an instrument of equal validity. The operation of that rule is, indeed, sometimes such, as to make it imperative upon a court of equity to interpose and grant relief, but it by no means follows, that the rule of law is to be broken down, because a Court having jurisdiction of another kind, will interpose where there is a particular case, in which the rule of law may be found to operate harshly. There is great objection to a court of law taking upon itself to act as a court of equity, because they have not the means of doing that full and ample justice which the particular case may require. We ought not, therefore, to interpose in a matter which seems peculiarly to belong to the jurisdiction of a court of equity. If a parol agreement is entered into to give time to the parties, supposing it not the case of a surety, but simply the case of a common bond conditioned for payment of money at a certain day, it will not prevent the party from proceeding at law immediately, whatever the consideration for the delay may be. And if that be so, how can the giving of time to a third person by such an agreement, prevent the obligee of the bond from proceeding at law against the surety. There may indeed be such a consideration for the agreement, as may induce a court of equity to direct that the party shall not proceed to enforce his remedy at law. But a parol agreement of this nature can never operate to controul the obligation of this bond in a court of law. The decisions which have taken place in the courts of equity in cases of this

nature,

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Duty

against

Particulars.

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against
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nature, have always, as I understand them, proceeded on the notion, that at law, the thing prayed for could not be done. Bills of exchange stand upon a very different footing, there the law merchant operates, and the courts of law decide upon them with reference to that law. Guaranties for the payment of debts are not in general instruments under seal, and there is no strict technical rule, which, as to them, prevents a court of law from looking to the real justice of the case. The cases of bail and replevin bonds are provided for, by acts of parliament giving to the court an authority over them. But in both these cases, the jurisdiction is exercised always upon special application founded upon affidavits and not upon plea. A recognizance of bail stands upon a different ground from bail bonds as to the jurisdiction of the court. There the jurisdiction is not founded upon statute, but upon a general authority in the Court, to see that an improper use is not made of its own records. Therefore, in that case, as well as in the case of bail to the action, and of bail to the sheriff, if the Court sees that an improper use is attempted to be made of the security which the party has given, it immediately interlocutes. And that also is always done upon special application to the Court, upon affidavits setting forth all the circumstances of the case. In the case of *Bulteel v. Jarrold* in the House of Lords, which has been referred to, in which an attempt was made to put the matter on the record by way of plea, it was held, that it was no bar to the action. So in this case, which appears to be the first of the kind brought before this Court, although similar cases must have occurred very frequently, I am of opinion that we, deciding on legal principles, are bound to say, that this plea is no answer

to

the plaintiff's action. There must, therefore, be judgment for the plaintiff.

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against
PENDEGRASS.

HOLROYD J. (a) I think that, in this case, the plea is not good in law. The circumstances there stated neither amount to a performance of the condition, nor to a legal excuse for non-performance of it. The bond which has been executed by these two sureties is conditioned for the payment of any balance not exceeding 500*l.* that may be due for goods sold upon credit to two other persons, within one calendar month after demand made. The effect of the plea is, that an unreasonable time was given to the original debtors, and that a warrant of attorney was taken for that purpose, having been given in pursuance of a parol agreement. Such an agreement, and the taking of the warrant of attorney, in my opinion, does not constitute, in law, a payment of the original debt, nor an annihilation of it. The mere giving time by parol, without consideration, is not even binding on the party himself. In this case, there seems to have been some consideration for the time given, namely, the giving the warrant of attorney, which would give the plaintiff a debt of a higher nature, by allowing a judgment to be entered up in case of non-payment of the first instalment. That certainly was a good consideration for the forbearance. But the merely giving an engagement that a man shall not sue for a limited time, is not a release in law of the original debt. An agreement that a man shall not sue at all, with a good consideration for it, amounts to a release, and would be an annihilation of the original

(a) Bayley J. was absent at Chambers.

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D₄ V_{EY}
against
PRENDERGRASS.

debt; but an agreement to give a limited time to pay the debt, as in this case, does not destroy the original debt, nor the liability to the payment of it. The original debt, then, remains; and by the condition of this bond, the obligors are bound to pay within a month after demand made of them. There is no performance of the condition of the bond, nor any release of the original debt. None of the circumstances mentioned in the plea amount to a performance of the condition; if they could, the condition would then be considered as performed, and the defence would be good in law. But that is not so; the whole defence set up arises upon a parol agreement. Now, suppose to that parol agreement the obligors had been parties, and the obligees had stipulated that they would not sue on the bond, still, unless that agreement was of as binding effect as the bond itself, it would avail nothing; for a mere parol agreement cannot be pleaded in bar, unless by operation of law it amounts to the performance of that which is the subject-matter stipulated for by the condition. Neither of these cases exist, from the circumstances which have been pleaded in this case; and, therefore, I think this plea does not amount to a defence in law. All the cases, or nearly so, upon this subject, except cases on bail-bonds, in which this Court entertains a sort of equitable jurisdiction, have been cases decided in courts of equity; and I think that the very principle upon which courts of equity give relief is, that the circumstances under which they give relief do not afford a good defence in point of law. I think this plea is bad.

BEST

BEST J. I am also of opinion that this plea is bad. The case which has been referred to, as having been decided in the Court of Exchequer, and finally in the House of Lords, appears to me, in principle, to be decisive of the present case. That being the case of a recognizance of bail, the Court had a right to interfere, with respect to the use made of that recognizance, being one of their own records, in a manner in which they would not interfere in an action upon a bond; but that circumstance made no difference in the decision. It was there decided, that the giving time to the principal, although the party might be relieved by the equitable jurisdiction of the court in which the recognizance of bail was taken, could not be pleaded in answer to the action. It is also perfectly clear, that no delay on the part of the creditor, in calling upon the principal debtor to pay, will, in a court of law, discharge the security. In the case of the *Trent Navigation Company v. Har-
ley*(a), it is there said by Lord *Ellerborough*, that no such delay would be a discharge of the security, in point of law, from an obligation of this description. The indulgence, by giving further time, is, in this case, by parole; if this would be an answer to an action on a bond in a court of law, there is no doubt we should have found numerous precedents on the records of this court, in which it had been so decided, because cases of this kind must have frequently occurred; but every instance in which relief is given by a court of equity, is a decision against this as a defence at law. I am of opinion, that if these defendants are entitled to any redress, they must go to a court of equity, where the Court may

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~~Dates
against
Parole~~(a) 10 *Eas.* 34.

1821.

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against
PAENDERGRASS.

consider every circumstance, and judge for itself whether any relief can be afforded. We, however, have only power to decide upon the legal validity of the instrument. I think, therefore, there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

**W. J. RICHARDSON the Younger and Others,
Assignees of the Estate and Effects of HENRY
WYLIE and W. J. RICHARDSON the Elder,
against CAMPBELL and Another.**

A transfer of a ship, while at sea, to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom-house officers in that port, within a reasonable time after the sale.

TROVER for a ship. Plea, the general issue. The cause was tried at the *London* sittings before Michaelmas term, 1820, when the jury found a verdict for the plaintiff for 1989*l.* damages, subject to the opinion of the Court on the following case:

A commission of bankrupt was issued, on the 23d December, 1817, against *H. Wylie* and *W. J. Richardson*, of *London*, merchants and partners, founded on a sufficient trading and petitioning creditor's debt, and an act of bankruptcy was committed by both the bankrupts on the 22d December, 1817, and the plaintiffs were appointed assignees under the commission. On the 30th December, 1816, the said *H. Wylie* and *W. J. Richardson* the elder, together with the other plaintiff, *W. J. Richardson* the younger, were the owners of the ship *Sir Alexander Ball*, belonging to the port of *London*. *W. J. Richardson* the elder, on the 7th September, 1815, (he being then a part-owner of the ship *Sir Alexander*

ander Ball,) duly executed a power of attorney to his partner, *H. Wylie*, to sell his share in the ship, &c. and execute a bill of sale in his behalf. A bill of sale of the ship to the defendants was duly executed by the respective parties on the 31st *December*, 1816; and another bill of sale was executed on the 21st *July*, 1817, by the said *W. J. Richardson* the younger, of part of the said ship. At the time of the execution of the bills of sale, the several parties thereto were resident in the city of *London*, except *W. J. Richardson* the elder, who was at sea. On the 31st *December*, 1816, when the first of the above-mentioned bills of sale was executed, the said *H. Wylie* handed over to the defendants the original bill of sale, which had been made to the said *W. J. Richardson* the younger, of one 64th part of the said ship, dated 28th *March*, 1816. At the respective times of the execution of the bills of sale, there was a much larger sum of money due from *Wylie* and *Richardson* to the defendants than the amount of the consideration expressed in the bills of sale. On the 31st *December*, 1816, the ship was at sea on a voyage from *London* to *Haiti*, and from thence to *Rotterdam*, under the directions of *W. J. Richardson* the elder, who was in her, and who was ignorant of the said transfers till the ship was taken possession of by the agents of the defendants. The ship, from the time she left *England* on her voyage, in *April*, 1816, has not since returned to the port of *London*, or any other port in *Great Britain*. No copy of either of the bills of sale was at any time delivered to the person or persons authorized to make registry and grant certificates of registry in the port of *London*, nor was any entry thereof indorsed, on the oath or affidavit, upon which the original certificate of registry of such

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against
CAMPBELL.

CASES IN MICHAELMAS TERM

1821.

Brought down
 during
 Christmas

ship or vessel was obtained, nor was any memorandum thereof made in the book of registers, nor was any notice thereof given to the commissioners of the customs in the port of *London*. In *January*, 1817, the ship arrived at *Leghorn*, under the command of the said *W. J. Richardson* the elder, and was shortly afterwards taken possession of by Messrs. *Fletcher, M. Bean*, and Co., as the agents of the defendants, by virtue of the transfers which had been made to the defendants, as before mentioned; and on the 11th *December*, 1817, the ship was sold and assigned by *Fletcher, M. Bean*, and Co., under a power of attorney from the defendants, and the certificate of registry of the ship, which had been deposited by the said *W. J. Richardson* the elder in the hands of his *Britannic Majesty's* consul, thereupon remained with the consul, for the purpose of being cancelled. This case was argued on a former day in these sittings, by *Campbell* for the plaintiffs, and *Puller* for the defendants; and the question turned entirely on the construction of the 31 G. 8. c. 68. s. 16. (a) It is unnecessary to report the arguments,

(a) The words of that section are: "Provided always, that if any ship or vessel shall be at sea, or absent from the port to which she belongs, at the time when such alteration in the property thereof shall be made as aforesaid, so that an indorsement or certificate cannot be immediately made, the sale, or contract, or agreement for the sale thereof, shall, notwithstanding, be made by a bill of sale or other instrument, in writing, as before directed; and a copy of such bill of sale or other instrument, in writing, shall be delivered, and an entry thereof shall be indorsed on the oath or affidavit, and a memorandum thereof shall be made in the Book of Registers, and notice of the same shall be given to the commissioners of the customs, in the manner hereinbefore directed; and within ten days after such ship or vessel shall return to the port to which she belongs, an indorsement shall be made and signed by the owner or owners, or some person legally authorized for that purpose by him, her, or them, and a copy thereof shall be delivered, in manner hereinbefore mentioned; otherwise

ments, inasmuch as they are adverted to in the judgment delivered by the Court, and did not materially differ from those which were urged, upon the same point, in the case of *Hubbard v. Johnstone*. (a) The authorities cited on the part of the plaintiffs were, *Moss v. Charnock* (b), *Palmer v. Moxon* (c), *Dixon v. Ewart* (d). On the part of the defendants, *Hubbard v. Johnstone*, and *Hodgson v. Browne* (e), were cited.

Cur. adv. vult.

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RICHARDSON
SOLICITOR
CAMPBELL.

ABBOtt C. J. now delivered the judgment of the Court. We are of opinion that this action may be maintained. The question is, whether at the time when the defendants took possession of and sold the ship, the title thereto was vested in them under the bills of sale executed by the plaintiff, *W. J. Richardson* the younger, and the bankrupts, or whether those bills of sale became invalid, and thereby the property at the time I have mentioned was vested in the plaintiffs. There is no objection to the sufficiency of the bills of sale in themselves: the objection to the defendants' title is, that by their omission to deliver copies of the bills of sale to the custom-house in *London*, within a reasonable time, the bills of sale became null and void. It is clear, that

wise such bill of sale, or contract, or agreement for sale thereof, shall be utterly null and void, to all intents and purposes whatsoever; and entry thereof shall be indorsed, and a memorandum thereof made, in the manner hereinbefore directed."

(a) 3 *Thant.* 177.

(b) 2 *Eas.* 399.

(c) 2 *M. & S.* 43.

(d) 3 *Merivale*, 322.

(e) 2 *Barn. & Ald.* 427.

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 against
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a reasonable time for delivering those copies had long expired, and no copies ever were delivered, so that the question is, in effect, reduced to the necessity of delivering copies. We who heard the argument, are all of opinion (*a*), that it was necessary to deliver them, and that by the omission to do so, the bills of sale became invalid by the effect of the 34 G. 3. c. 68. s. 16. In support of the defendant's title, and against the necessity of delivering copies, the decision of the Court of Exchequer Chamber in the case of *Hubbard v. Johnstone*, was cited and relied upon. But there is a material difference between the two cases. In that case, the ship belonged to, and was registered in the port of *Newcastle*. While she was at sea on a voyage, a bill of sale was executed, conveying the property to *Hubbard*, who resided in *London*. The ship never went to the port of *Newcastle*, but came to *London*, and was there registered anew by *Hubbard* the vendee, at the custom-house in *London*. In the present case, the ship belonged to *London*; the bills of sale were executed in *London*, and the defendants were resident in *London*, so that the change of owners would not occasion a change of port. In the former case, according to Mr. *Taunton*'s report, the opinion of one at least of the learned judges who were for reversing the judgment of this Court, was grounded entirely upon the change of the ship's port; he being of opinion, that the 16th section of the statute is confined to the case of a sale when the ship is at sea, and does not change her port. This change of port appears also to have weighed materially with the other judges, though it appears that some of them, and par-

(*a*) *Abbott* C. J., *Bailey* J., and *Holroyd* J.

...
ticularly

ticularly Mr. Baron Wood, thought the annulling clause at the end of the 16th section, must be confined in construction to the omission of an indorsement, and delivery of a copy thereof, within ten days after the ship's return to her port, and could not be extended to any of the precedent parts of the section, because it could not be extended to all the precedent parts, as it undoubtedly cannot. In the present case, as I have before observed, the change of ownership would not lead to a change of port, and the present case is not one of those in which the legislature has required a register *de novo*. And supposing the words "alteration of property in the port to which the ship belongs," as they are found in the 15th section, by which an indorsement on the certificate and delivery of a copy thereof are required, to be confined to a change of owners only, without a consequential change of port, we think it clear, that if the ship be absent from her port at the time of such change, "so that an indorsement on the certificate cannot be immediately made," which are the words of the 16th section, the delivery of a copy of the bill of sale is, by that section, substituted in the place of the indorsement on the certificate, until ten days after the ship's return, and the omission to deliver a copy of the bill of sale is to be followed by the same consequence in the case of an absent ship, as the omission to make the indorsement and deliver a copy thereof, if the ship be at home. In the 15th section, the clause of nullity follows immediately after the requisition of the indorsement and delivery of the copy thereof, and is itself followed by the direction to the officers, to which therefore it does not apply in form, as in reason it ought not to apply. The 16th section begins with the word "provided always,"

and

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and evidently contains a substitution of a new matter in the place of the matter previously required by the 15th, where the matter so previously required is impracticable; and therefore, even if the 16th section had contained no express clause of nullity, still there would be strong reason to say, that the clause of nullity in the 15th section should be drawn down and applied to so much of the 16th, as contained the substituted matter. But taking the two clauses together, and seeing that, by the very form and frame of the 15th section, the clause of nullity applies only to the acts of the parties, we find no difficulty in saying, that it may be so confined in the 16th section, although it follows all that is therein mentioned, as well the acts of the parties as those of the officers; and that it may, and ought to be extended to all the acts of the parties, as well that act which is mentioned before the direction to the officers occurs, as that which is mentioned after such direction. If this be not the true construction of the 16th section, in a case to which that section will apply, if it be not necessary to deliver a copy of a bill of sale, in the case of a sale made in the ship's absence, to a person residing at her port, then it may follow, that the ship may, for as many years as she shall continue serviceable, enjoy the privileges of a *British* ship, and trade as such, not only from one plantation or part of the king's foreign dominions to another, but also from, and to any port of *Great Britain*, except her own port, and during the whole of this period, the names of her real owners will be unknown to, and undiscoverable by, the officers of the government. And this, as far as it extends, will be utter contravention of the policy of these statutes, & defeat their object, which object unquestionably was

furn

furnish, by the medium of registration, an accurate knowledge, at every instant of time as far as practicable, of the name of every person having property in a *British* ship, in order to secure the benefits of that national character of a ship to his majesty's subjects; and to exclude foreigners from participating in them.

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against
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Judgment for plaintiff. (a)

(a) It appeared in this case that the ship, on her arrival at Leghorn, was attached, to answer a claim made on behalf of certain merchants in London, for compensation on account of her not having carried a quantity of tobacco (which had been shipped at Hayti) to Rotterdam, agreeably to bills of lading; and the defendants' agents were obliged to give security to answer this claim, and, afterwards, under the sentence of the Court, to pay the amount thereof. The defendants' agents had, besides, paid, in pursuance of an order of a competent court at Leghorn, a certain sum for salvage of the ship, she having been driven on shore in a gale of wind before she was taken possession of by them. They had also paid, in pursuance of an order of the court, a certain sum for the wages of the captain and the crew. And they had also paid other sums for bachelors' and ship-chandlers' accounts, and sundry ship disbursements, before she was taken possession of by them. And it appeared, further, that the defendants knew of the fact of the voyage to Rotterdam having been abandoned; for they had cancelled a policy originally effected from Hayti to Rotterdam, and effected another from Hayti to Malta. The Court were clearly of opinion, that the money paid under the attachment, the salvage, and the mariners' wages, were a lien on the ship, and that the defendants, therefore, were entitled to deduct those sums from the proceeds of the sale of the ship, but not the sums paid for the captain's wages, nor the disbursements; and the verdict was reduced accordingly.

1821.

MURRAY, Administrator of W. HOPE, deceased,
of the Goods left unadministered by JAMES
MURRAY, deceased, *against* The EAST INDIA
Company.

Assumpit will lie upon a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognized by statute.

A power of attorney authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all monies, debts, dues, whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principal.

In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing.

An agent, having money in his hands belonging to his principal, purchases with it a bill of exchange, which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character: Held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator, from the time of demand of payment made by the administrator, and not from the time the bills became due.

Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendants' liability, &c.; and the defendants pleaded that the cause of action did not accrue within six years, to which the plaintiff replied generally, that it did accrue within six years: It was held, that the replication was good.

in the same form as the first. The fourth bill, which was for 705*l.*, was dated the 26th *August*, 1809, and was accepted from the 12th *April*, 1810, and payable at twelve months' sight to Measrs. *Binny* and *Dennison*, and indorsed by them to *William Hope*, Esq., or order.

The declaration contained counts on the first three bills, stating, respectively, the drawing of the bills; the acceptance of them, after the death of *William Hope*; the grant of administration to *James Murray*, on the 13th *February*, 1812; the liability of the defendants to pay to *James Murray*, as administrator, according to the form and effect of the bills; and their acceptance, and a promise to *James Murray*, as administrator, accordingly. Another set of counts on these three bills stated, the drawing of the bills; the acceptance of them; that neither the said *W. Hope*, nor *James Murray*, nor the plaintiff, nor any persons as the personal representatives of *W. Hope*, made any order for payment of the bills; nor had the money been paid to them, or either of them: the grant of administration to *James Murray*, on the 13th *February*, 1812; the grant of administration of the 31st *October*, 1814, to the plaintiff; the liability of the defendants to pay the plaintiff, as administrator, on request, and a promise accordingly. The declaration also contained a count on the fourth bill, stating the drawing of the bill; the indorsement by *Binny* and *Dennison*; the payees ordering the money to be paid to the said *W. Hope*; the acceptance; the grant of administration to *James Murray*; the liability of the defendants to pay to *James Murray*, as administrator, according to the tenor and effect of the bill; and acceptance, and a promise to *James Murray*, as administrator, accordingly. Another count on the same bill, after

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stating the drawing of the bill, alleged that *Bisney* and *Dennison*, after the death of the said *W. Hope*, having been indebted to him at the time of his death in the sum mentioned in the bill, and the debt remaining due and unpaid, in satisfaction of the said debt indorsed the bill at *Madras*, ordering the money to be paid to the said *W. Hope*, and remitted the bill to *England* in a letter, addressed to *Hope*; that after his death, the defendants accepted the bill; that after the bill was due, administration was granted to *James Murray*, whereby the said defendants became liable to pay to him, as administrator, on request, and promised payment accordingly. The declaration contained the common counts; and a profert of the letters of administration was subjoined. Plea, non assumpsit; secondly, as to the counts on the first three bills, that the causes of action did not accrue within six years before the commencement of the action. Replication, that the causes of action did accrue within six years, &c. The cause was tried before *Abbott* C. J., at the sittings after *Trinity* term, 1819, when the jury found a verdict for the plaintiff for the principal sum due upon the bills, with interest from the time they respectively became due till the time of signing final judgment. Upon a motion for a new trial, the Court directed the facts to be stated in a special case.

The four bills of exchange declared upon were drawn by order of the governor in council, at *Madras*, in the usual form in which bills of exchange are drawn upon the *East India Company* at home from the different presidencies in the *East Indies*. They were severally accepted in the usual manner by the secretary to the Company, by order of the Court of Directors. Bills so drawn on the Company are always accepted in this form by the secretary for

for the time being, by order of the Court of Directors, and being so accepted, are paid by the Company. The defendants have paid bills, so drawn and accepted, to the amount of many millions. Mr. *Hope*, the payee of the three first bills, being about to embark for *London*, remitted them in a letter by one of the ships in the fleet hereinafter mentioned. This letter was inclosed in a sealed envelope, addressed thus: "Wm. *Hope*, Esq., to the care of *John Card*, Esq., *London*." It was not addressed to any person by name, and was as follows: "My old friend, you will find inclosed bills as follows, which, when cashed, I would recommend your being particularly careful of." The letter then specified the several bills inclosed, including the first three bills mentioned in the declaration in this cause. On the 30th *January*, 1809, *Hope* embarked, with his wife and family, on board the ship *Jane Duchess of Gordon*, and sailed with a large fleet of *East Indiamen* for *Europe*. On the 14th of *March* the fleet encountered a hurricane, and the *Jane Duchess of Gordon* perished in the storm, and *Hope* was drowned. On the 7th of *October*, 1800, *Hope* executed a power of attorney to *Card*, by which he appointed *J. Card* to be his true, certain, and lawful attorney for and in his name, and to and for his proper use and behalf, to demand, levy, sue for, recover, and receive, by all lawful ways and means whatsoever, and from all and every person and persons whomsoever, whom it did or might concern, all such sums of money, debts, dues, goods, effects, and things whatsoever, which then were and should be and prove due, owing, payable, or belonging to him the said *W. Hope*, upon or by virtue of any bill, bond, book, or upon account of trading or dealing, or upon any account howsoever;

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and, if need were, to call to account all persons concerned in the premises; and upon receipt and recovery of all such sums of money, debts, dues, goods, effects, or other things, or any part thereof, sufficient acquittances and discharges for him and in his name, from time to time, to make and give; giving and granting by them, unto his attorney full power and authority in the premises to sue, pursue, arrest, attach, seize, sequester, implead, imprison, condemn, and prosecute, and them and thereof again to acquit, discharge, and out of prison to release, also for him to appear, and his person to represent in all or any court or courts, or other places, as demandant or defendant in any suit or action, or by reason of the premises; likewise one or more attorneys under him, to set and substitute and appoint, and again at pleasure to revoke; and generally to do, act, and perform all other matters and things in and towards the premises requisite and necessary, as fully as himself could do, if he were personally present. *John Card*, who was at *Madras* at the time when the power of attorney was executed, and who had been at one period in partnership with *Hope*, in *India*, soon after sailed to *England*, and since his arrival has continued to reside here, and has been in partnership with *William Davies*, under the firm of *Davies and Card*. The first three bills of exchange were not indorsed by *Hope*, but having come into the possession of *Card* after *Hope's* death, were indorsed by him in the following form. "Pay Messrs. *Davies* and *Card*, or their order, per procuration of *William Hope*. — *J. Card*." These bills, when due, were paid by the defendants to *Barclay, Tritton, and Co.*, then the holders thereof. Before *Hope* left *Madras*, he appointed Messrs. *Binny* and

and *Dennison*, of *Madras*, his agents, to manage his private affairs, collect his property there, and transmit the same to *London*; and he left in their hands a government promissory note for 1660 pagodas, which was paid by them at the treasury, and they received for it the fourth bill of exchange mentioned in the declaration. *Binny* and *Dennison* indorsed the bill specially to *Hope*, and remitted it in a letter addressed to him at Messrs. *Davies* and *Card's*. The letter came to *Davies* and *Card*, in April, 1810, was opened, and the bill taken out, and the name "*W. Hope*" was indorsed on the bill. This bill was paid when due to *Glyn, Mills* and Co., then the holders thereof. On the 19th February, 1812, letters of administration of the effects of *Hope*, with his will annexed, were granted to *James Murray*. There were no executors named in the will of *Hope*. *James Murray* died on the 10th October, 1814, and on the 31st of October, 1814, letters of administration of the effects of *Hope*, unadministered by *James Murray*, with his will annexed, were granted to the plaintiff. The action was commenced on the 27th of August, 1816.

This case, which involved several points, was argued on a former day in these sittings, by *Campbell*, for the plaintiff, and *Tindal*, for the defendant. For the plaintiff it was contended, that assumpsit was maintainable in this case against a corporation; for a corporation established for trading purposes, might bind themselves, by accepting bills of exchange. *Broughton v. The Manchester Water-Works.* (a) And this power of the defendants to draw and accept bills was recognized and regulated by the 9 and 10 W. 3. c. 44., and the 53 Geo. 3.

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(a) 3 Barn. & Ald. p. 1.

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c. 155., s. 57 and 58. In *Edie v. The East India Company* (b), it was not doubted that an action would lie against the Company upon a bill of exchange. As debt will not lie against the acceptor of a bill of exchange, assumption must in this case, otherwise there will be no remedy. For the defendants, upon this point, it was argued, that although they had undoubtedly the power of binding themselves as acceptors of bills of exchange, it by no means followed, that the remedy which the law gave for the breach of a parol promise, would apply against a corporation. The objection to this form of action was, that a parol promise can be made only by the members of the corporation, and that the individuals, and not the body corporate, would be liable. The proper remedy in this case was by bill in equity. Upon this point, the Court were clearly of opinion, that wherever an act of parliament authorizes a corporation to draw and accept bills, it must be taken to give the holder of those bills the same remedy against the body corporate, as the law gives in other cases against any parties to a bill.

The next point was, whether *Card* was authorized to indorse these bills; and it was contended, for the plaintiffs, that he had no authority to indorse the bills, even during the life of *Hope*. The power of attorney only gave an authority to him to receive debts due, and not to negotiate the bills. *Hogg v. Snaith* (b) and *Hay v. Goldsmidt*, there mentioned, were authorities to shew, that a power of attorney to receive all salary and money belonging to the principal, and to give releases, and even to transact all business for him, did not authorize the attorney to negotiate or indorse bills. The letter contained no such power, for *Card* had not even an au-

(a) 2 *Burr*, 1216.(b) 1 *Taunt.* 347.

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thority to break the envelope. For the defendants, it was argued, that *Card* had such authority; for the indorsing of the bills was one mode of receiving payment, and in the cases cited, the action was brought against the persons who had discounted the bills, and not against the acceptor; and it was the same thing, whether *Card* received the amount of the bills at maturity, or authorized another to receive it. Besides, it appeared clearly, from the terms of the letter, that *Card* was to open it, if *Hope* died on the voyage. The words in the letter "when cashed," implied, that he was to have authority to indorse the bills; for one mode of cashing is by indorsement. Upon this point, the Court were clearly of opinion, that *Card* had no authority to indorse the bills, even during the lifetime of *Hope*; and that it therefore became unnecessary to consider the question, whether *Hope's* death operated as a revocation of any authority given to him by the power of attorney.

Upon the other points raised in this case, the Court gave no opinion at the time. It was contended on the part of the defendants, that the plaintiff could not be entitled to recover interest upon the bills beyond the date of the first letters of administration, for it would be very hard upon an acceptor, that he should be charged with interest when he was ready to pay the money, and there was no person authorized to receive it. There could be no wrongful detainer of the money until the administration was granted, *Walker v. Barnes* (a) and *Anonymous* (b) were cited. As to the two other points raised in the case with respect to the statute of limitations and the form of the replication, the follow-

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(a) 5 *Taunt.* 240.(b) 6 *Mod.* 138.

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ing authorities were cited, *Stanford's* case in *Saffyn v. Adams* (*a*), *Joliffe v. Pitt* (*b*), *Cary and Wife v. Stephenson* (*c*), and *Matthews v. Phillips*. (*d*) The arguments and the authorities cited upon these points, were, however, so fully commented on by the Court in giving their judgment, that it is unnecessary to state them at greater length here.

C. A. V.

ABBOTT C. J., now delivered the judgment of the Court. At the late argument of this case, some of the points were disposed of by the Court at the time. It is now proposed to give our judgment upon such as were then reserved for our further consideration. And first, as to the statute of limitations. The action is brought by an administrator, with a will annexed, of goods left unadministered by a former administrator, but it may be considered as brought by the first administrator. The action is upon several bills of exchange accepted by the defendants, who have pleaded as to three of them, that the cause of action did not accrue within six years before the exhibiting of the plaintiff's bill. The plaintiff has replied generally, that the cause of action did accrue within six years, &c. These bills were made payable to Mr. *Hope*: they were accepted after his death, being presented through an unauthorized channel, and before any administration was granted. The acceptance of the bills, and also the day of pay-

(*a*) *Cro. Jac.* 61.(*b*) *2 Vernon*, 694.(*c*) *Salk.* 421. *Cartew*, 335. *Skinner*, 555. and *4 Mod.* 372. S. C.(*d*) *Salk.* 424.

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ment, was more than six years before the exhibiting of the bill, but the granting of the first administration was less than six years before, &c. Upon this state of facts, the general question of law, abstracted from the particular form of the replication, is this; did the time of limitation prescribed by the statute 21 Jas. 1. c. 16. s. 8., begin to run from the date of the defendants' acceptance, or the day of payment, at which time there was no person in existence who could acquire a right of action by the acceptance, and non-payment, or from the date of the first administration, whereby a person was brought into existence, who might acquire a right of action by the non-payment? The plaintiff insisted upon the latter, the defendants upon the former date.

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On behalf of the plaintiff, *Stanford's case*, cited in *Cro. Jac.* 61., and *Cary v. Stephenson*, reported in *Salkeld*, 421., and several other books, were quoted. The first of these cases arose upon the statute of fines, 4 Hen. 7. c. 24.; a term of years was granted in remainder, expectant on another existing term; before the expiration of the first term, the grantee died: at the expiration of the first term, the lessor entered, and levied a fine before administration granted; the five years passed, administration was granted, and resolved, that the administrator should have five years, for none had title of entry before. The last of these cases is precisely the same as the present case. It was an action of assumpsit for money had and received, brought against one who had received money belonging to the estate of the intestate, after his death, and before administration granted; the receipt being more than six years before the action, but the grant of the administration within six years. The opinion of the Court was, that the time of limitation did not begin to

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run until the grant of the administration; but the suit appears to have gone off, or the plaintiff to have failed upon a supposed defect in his replication. Since the argument, we have been apprized of another case lately decided in the Court of Common Pleas, but not reported. The name of it is *Falclaim v. Little*. It arose upon the gift of a term of years to *A.* for life, remainder to *B.* for life, remainder to *C.* *C.* died in 1780, *A.* in 1757, *B.* in 1779. Administration of the effects of *C.* was first granted in 1816, and the administrator brought an ejectment, and was nonsuited at the trial, but the Court granted a new trial. No authority was quoted on this part of the case, on behalf of the defendant. But it was said, that *Stanford's case* was not an authority in point, because it arose on a statute differently expressed; the words of the statute *Hen. 7. b. 5.* being "so that they take their action or pursue their right within five years next after such action, right, &c. to them accrued, descended, &c." In answer to the other case quoted for the plaintiff, it was said, that as the cause was not decided in favour of the plaintiff, the opinion must be considered as extrajudicial, and that the whole of that case taken together, was in favour of the defendant upon the other point, to which I shall advert hereafter. We are, however, of opinion, that the time of limitation in the present case did not begin to run until the grant of the administration. The words of the statute *21 Jac. 1. c. 16. s. 3.* are, that actions upon the case, &c. shall be brought within six years, next after the cause of such actions, and not after. Now, independently of authority, we think that it cannot be said, that a cause of action exists, unless there be also a person in existence capable

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of suing. And we think great deference is due to the opinion delivered by the Judges on this point in *Cary v. Stephenson*, and also, that *Stanford's* case, and the late case in the Common Pleas, are authorities in favour of the plaintiff. The several statutes of limitation being all in pari materia, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same. I have already quoted the words of the statute of fines. The words of the first section of 21 Jac. 1. c. 16., as it regards entry into lands, are, "that no person or persons shall make entry into any lands, &c. but within 20 years next after his or their right or title, which shall hereafter first descend or accrue to the same." Other slight variations of expression may be found in other parts of this, and the statute 32 Hen. 8. c. 2. But it is not necessary to particularise them; the object manifestly being to limit the time of entry or suit to a person in esse, capable of entering or suing, and nothing more.

On this part of the case, another and formal objection was taken by the defendants. It was said, that the plaintiff ought to have made a special replication, setting forth the time of the grant of administration and other particulars. Now, it already appears upon the record, that the acceptance was after the death of the intestate. What special matter then could the plaintiff reply? It could only be, that the first administration was granted at such a certain time, which probably does not appear with sufficient precision upon the declaration. But this would only have been an argumentative replication, for its effect would be this: you, the defendants, have alleged that the cause of action did not accrue within six years: I, the plaintiff, say, that it did accrue within six

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1821. years, because my bill has been filed within six years of the grant of administration. Now, if this be the due effect of the grant of the administration, then the plaintiff did right in omitting the argument, and replying generally, that the cause of action did accrue within six years, and offering the administration, and the time of granting it, in evidence, to prove his allegation. And this is very different from all the cases in which a special replication is usually made, such as infancy, coverture, absence beyond sea, or the suing out a latitat, or other writ, or process, because, in all those cases, the plaintiff admits, that the action did not really accrue within six years of the apparent commencement, and either brings himself within some exception in the statute, or shews that his action was commenced before the date, which the plea assigns as the commencement of it.

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There was a fourth bill of exchange, to which the statute was not pleaded, and which gave occasion to another point. Mr. *Hope*, at his departure from *India*, had left some property under the management of an agent. For the value of this, and for the purpose of transmitting the value to *England*, the agent obtained this bill of exchange, and being ignorant of the death of *Hope*, indorsed it specially to him. It was urged, that no property in this bill could pass to the administrator, and consequently, that he could not sue upon it. But we are of opinion, that as the money for which the bill was remitted, belonged to *Hope*' estate, it was competent to the administrator to elect to take the bill as the mode of payment, and that thereby, the property did vest in him, and he acquired a right to sue upon it.

The only remaining matter is the interest upon the bills, which has been taken from the time that they respectively fell due. We are of opinion, that the plaintiff is entitled to recover interest, but that the calculation must begin from the time of the demand of payment by the first administrator, and not sooner.

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Judgment for the plaintiff.

REGULA GENERALIS.

*Wednesday,
November 6th.*

Michaelmas Term, 2 Geo. 4.

IT IS ORDERED, that the rule of Court made in *Michaelmas* term, in the 11th year of King George the First, which directs that no summons shall be attended, nor any matters transacted before any Judge at chambers or elsewhere, during the sitting of this Court at *Westminster*, be discharged.

By the Court.

During the term one of the Judges attended daily at chambers from half past two until four.

In the Matter of TAYLOR and Others.

F. POLLOCK moved for a rule nisi in this case, to discharge the rule for making the submission to arbitration a rule of court. The facts were shortly as follows. It was a submission to arbitration, by bond under the statute of 9 and 10 W. 3. c. 15 s. 1.

A submission to arbitration, under 9 and 10 W. 3. c. 15 s. 1., may be made a rule of Court in *vacation*.

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*In the Matter of
TAYLOR.*

The award was dated on the 30th *June* last, but the submission was not made a rule of court till the 28th *September*, during the vacation after last *Trinity* term. A bill in equity had been since filed by the party against whom the award was made. He now contended, that in this case, by the words of the statute, the submission can only be made a rule of court, by producing an affidavit of the execution of the agreement, and reading and filing it in court. This shews that it must be done in court, and cannot be done in vacation, as was the case here.

Scarlett shewed cause in the first instance. The object of the statute was to facilitate arbitrations, and to prevent bills in equity. It must be construed with reference to the ordinary practice of the Court in other cases. Now, it is the practice to do business in vacation as of the preceding term. Thus a writ may be issued in vacation tested of the preceding term. As to the affidavit, that can make no difference, for that is equally required in a bailable writ, a rule for a special jury, or to compute principal and interest, all of which by the practice of the Court may be issued in vacation.

F. Pollock, in support of the rule, contended, that cause might be shewn against a rule, for making a submission to arbitration a rule of court, and that there was no authority to compel a party to shew cause before a Judge at chambers. As to judicial writs, they are at common law, and the practice of the Court may therefore regulate them. This case depends on the construction of a statute, and stands therefore on quite a different ground.

ABBOTT

ABBOTT C. J. If we were to grant the present application, we should do great mischief, inasmuch as the granting these rules in vacation, is a practice attended with much convenience to the suitors of the Court. It seems to me, that by construing the statute with reference to the ordinary practice of the Court, we shall give fuller effect to the intention of the legislature. The statute makes it compulsory on the Court, on the affidavit being produced to make the submission a rule of court. It is, therefore, merely a matter of form to apply for the rule. No injury is done to the other party by granting the rule, for the award cannot be enforced till the next term. All that is done, is, that a little time is gained by making the demand, and serving the rule of court during the vacation, so as to enable the party to make an application for an attachment on the first day of the next term. If we were to overturn the practice in this case, we should establish a dangerous rule, for, by parity of reasoning, no consent rule in ejectment, no rule for a special jury, or to pay money into court, could be drawn up in vacation. The consequence would be great delay in the administration of justice. This rule must therefore be refused.

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Rule refused.

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*Thursday,
November 7th.*PHILLIPS *against* HOWGATE.

In trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff; and, during such imprisonment, struck, pulled, and pushed him about. *Justification*, that defendant arrested plaintiff under process of court; and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c. : Held, that this latter part of the justification not being proved, the plaintiff was entitled to judgment; and, that it was not necessary to new assign the battery by the defendant.

Held, also, the second count of the declaration (which omitted as to the battery, with respect to the second and third the battery),

having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses, as laid in the first count.

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counts of the declaration. Replication, *de injuria, &c.* and issue thereon. At the trial, at the last assizes for the county of York, before *Bayley J.*, the defendant proved the arrest to have taken place in the manner alleged in his justification. But the plaintiff having proved a battery during the time that he was in the defendant's custody, the learned Judge thought that it was necessary for the defendant to give some evidence of outrageous conduct on the part of the plaintiff when in custody, so as to prove the latter part of the defendant's first justification; and he finally left the question to the jury, whether what was done by the defendant was more than was necessary for the purpose of keeping the plaintiff safely in custody. The jury found a verdict for the plaintiff. And now

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I. Williams, by leave of the learned Judge, moved to enter a verdict for the defendant. In this case, the plea having justified the breaking and entering, and the arrest and the imprisonment of the plaintiff, and having, to that extent at least, been proved, is a full answer to the first count; for these circumstances are the gist of the action, and the battery is only matter of aggravation; and if the plaintiff meant to rely upon it, he should have done it by a new assignment, and that, it appears, was the opinion of *Buller J.* in *Taylor v. Cole*. (a) It cannot signify that in his first justification the defendant alleges the outrageous conduct of the plaintiff as a ground for the battery, and so justifies the battery; for if what is proved amounts to a sufficient justification, the having alleged other matter, not proved, will not vitiate

(a) 3 T.R. 297

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against
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it, *Spilsbury v. Micklethwaite.* (a) Besides, the justification to the second count was completely proved, and only one assault was proved, and the defendant may, therefore, apply the justification to that.

ABBOTT C. J. I am of opinion, that in this case the Court ought not to grant the rule. If this question were considered upon the first count of the declaration alone, it seems to me that the plaintiff would be clearly entitled to a verdict. That count contains a charge of breaking and entering the plaintiff's house, and of assaulting and imprisoning him, and, during the imprisonment, of pushing, striking, and pulling him about. To this count there is a justification; and it is contended, that the whole of the above trespasses are justified by proof being given of a writ of attachment and a warrant to the defendant, as bailiff, to execute that writ. Now, if so, I agree that the circumstance of the defendant's having put more into his justification, of which no proof has been given, will not vitiate it. But I am of opinion, that the proof given is not sufficient to justify the trespass in pushing and striking the plaintiff. In order to justify that, it was necessary to prove that part of the defendant's justification in which he states, that the plaintiff resisted when in custody. That not being done, I think the justification was not proved, and that the plaintiff would be entitled to a verdict. This would be the case, if there had been only one count in the declaration, and one plea of justification. But there is a second count, to which there is a plea of justification, which has been established. That count,

(a) 1 Town. 146.

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however, was quite unnecessary for the plaintiff's case; and I think it can make no difference. Here, the plaintiff has, in his first count, stated the whole injury which he has received, and that count has not been justified. He is, therefore, entitled to a verdict.

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BAYLEY J. The plaintiff proved, at the trial, the whole of his first count. The plea of the defendant, if true, would have been a good justification; and, as it seems to me, it was necessary to allege the misconduct of the plaintiff, in order to justify the pushing and striking by the defendant. For, if it had omitted such an allegation, the plea would have been demurrable. The justification, though well pleaded, was not sufficiently proved; and the plaintiff, therefore, was entitled to a verdict.

BENT J. (a) concurred.

Rule refused.

(a) Holroyd J. was absent at Chambers.

Doe on the Demise of HUMAN against PETTETT.

Thursday,
November 7th.

EJECTMENT, for certain premises at Fordham, in the county of Cambridge. Plea, general issue. At the trial, before Dallas C. J., at the last Summer assizes for that county, it appeared, that John Human was the original purchaser of the premises, and that after his death, about thirty years ago, his widow continued in

The declarations of a widow in possession of premises, that she held them for her life, and that after her death they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession.

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possession for about twenty years, and then died. The defendant was the heir at law of the widow, and the lessor of the plaintiff was the heir at law of *John Human*. In order to shew that the widow's possession was not adverse, the learned Judge admitted evidence of her declarations during her possession of the premises, shewing, that she held the premises for her life, and that after her death, they would go to the heirs of *John Human*. The plaintiff had a verdict; and now

Blossett Serjt. moved to enter a nonsuit, upon the ground that these declarations were not admissible. The declarations of a tenant for life are not admissible, to shew the extent of his interest. Such declarations, in order to be receivable as evidence, must be, when made, against the then present interest of the parties making them. *Peaceable v. Watson* (a), *Doe v. Jones* (b) In *Comyns's Digest*, tit. *Seisin*, F. 1., it is laid down, "that if a man enters by a disseisin, he will be a disseisor, though he claims only for years, as tenant by statute, in dower, &c., where they have no right to it; for they cannot qualify their wrong." Here, the declarations of the widow, if she had no right, would go to qualify her wrong, and if she had a right, they would be inadmissible, as being in favour of her own interest, upon the ground previously stated.

ABBOTT C. J. All questions of evidence must be considered with reference to the particular circumstances under which it is offered. Here, the question was, whether the widow had occupied the premises adversely,

(a) 4 *Tennut.* 16. (b) 1 *Campb.* 267.

for more than twenty years, and her declarations are offered in evidence to rebut the statute of limitations, and for that purpose, I think they were admissible. They were not used to shew the quantum of her estate, but only to explain the nature of her possession.

1821.

Dog dem.
HUMAN
against
PERVERSE.

Rule refused.

RAYNER against GODMOND.

*Thursday,
November 7th.*

ACTION on a policy of insurance on the ship *Neutral*, from *Wisbeach* to *Leeds* or *Wakefield*. The policy was on 230 quarters of wheat, valued at 900*l.* It contained the usual memorandum at the foot, "Corn, &c., warranted free from average, unless general, or the ship be stranded." At the trial, at the last sittings at *Guildhall*, before *Best J.*, the only question was, whether the ship had been stranded. As to that, the facts were as follows. The ship having sailed from *Wisbeach*, arrived safely at *Selby*, where, having taken out her anchors, stores, &c., she proceeded up the navigation towards *Wakefield*. In the course of the voyage, she arrived at a place called *Beal Lock*, and whilst she was there, it became necessary, for the purpose of repairing the navigation, that the water should be drawn off. The master placed the vessel in the most secure place he could find, alongside of four other vessels. In this he was assisted by the lock-keeper. The water being then drawn off, all the vessels grounded, and, unfortunately, the ship *Neutral* grounded on some piles in the river, which were not known to be there, and the cargo received considerable damage. The part of the navigation

Where, during the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there: Held, that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of such voyage.

Ver. V.

Q

where

1891.

RAYNER
against
GODMOND.

where she took the ground was one in which vessels usually were placed when the water was drawn off. The learned Judge was of opinion that these facts amounted to a stranding, and the plaintiff had a verdict. And now,

Campbell moved for a new trial. He contended, that in this case, there was no stranding. Here, the vessel was intentionally brought into this position, and it is impossible she can be considered as stranded, unless all the other four ships with her were equally so; for the mere circumstance of the additional damages to her, cannot make a difference. *Burnett v. Kensington.* (a) The case of *Dobson v. Bolton* (b), sittings after *Easter* term, 1799, comes nearest to this. But there the vessel in the *Wisbeach* river was driven on the piles by the perils of the sea. Here there was no such thing. This was like the case of a vessel in a dry harbour, or of those which are continually laid on the mud in coming up the *Thames*. But in those cases, it has never yet been considered that ships are stranded, and the underwriters liable for an average loss. In *Hearne v. Edmunds* (c), the Court held, that where a vessel took the ground in going up the river at *Cork*, in the ordinary course of navigation, and was damaged, it was not a stranding for which the insurers was liable. Here it was in the ordinary course of this sort of navigation, that the accident happened. *Carruthers v. Sydebotham* (d) is indeed near this case; but that decision is questionable, and ought not to be carried further.

(a) 7 *T. & A.* 210.(c) 1 *B. & B.* 386.(b) *Marshall on Insurance*, 239.(d) 4 *M. & S.* 77.

ABBOtt C. J. The case of *Hearne v. Edmunds* has relieved my mind from the only remaining difficulty which I felt in this case, which was, lest it should follow; from our decision, or from that of *Carruthers v. Sydebotham*; that every settling on the ground by a vessel should be deemed a stranding; but that case was decided on a distinction which leaves *Carruthers v. Sydebotham* a valid authority; for there the accident happened in the ordinary course of the voyage; and on that ground the underwriters were held not to be liable. Here the loss did not so happen; for we cannot suppose that these canals are so constantly wanting repair, as to make the drawing off the water an occurrence in the ordinary course of a voyage. I think, therefore, that, in this case, the vessel was stranded; and that there is no reason for disturbing the present verdict.

1821.

Rights
against
Cottons.

BAYLEY J. This was an insurance on a perishable commodity, and the object of the memorandum was to exempt the underwriters from loss, unless there was an adequate cause for it. If, however, the ship was stranded, they were to be liable. The case of *Carruthers v. Sydebotham* is very like this. There, on the ebbing of the tide, the ship fell over and received damage, and the Court held, that it amounted to a stranding, because the ship was upon a strand. In *Hearne v. Edmunds*, the ship never was on the strand, within the meaning of the parties; for there, in the ordinary course of the voyage, it was quite certain that the vessel would, by the regular flux and reflux of the tide, be left on the mud. And the fair construction of the words of this memorandum, which reconciles that case with *Carruthers*,

1821.

RAYNER
against
GODMOND.

v. *Sydebotham*, must therefore be, that when, in the ordinary course of the voyage, the ship must go on the strand, the underwriter is exempt; but where it arises from an accident, and out of the ordinary course, he is liable. That was the case here, and, therefore, the verdict is right.

BEST J. (a) If *Carruthers v. Sydebotham* had been broken in upon by subsequent decisions, it might, perhaps, have been necessary to reconsider it; but the case of *Hearne v. Edmunds*, in the Common Pleas, has confirmed it. Here, the accident producing the loss was one not to be expected. In the case in the Common Pleas, the event must happen every tide. I think a stranding may properly be said to take place, where a ship, by accident, and not in the ordinary course of the voyage, is rendered immovable on the strand.

Rule refused.

(a) *Holroyd* J. was absent at Chambers.

Friday,
November 8th.

WILSON and Another against COUPLAND and Another.

Where the plaintiffs were creditors and defendants debtors to T. and Co., and, by consent of all parties, an arrangement was made that defendants should pay to plaintiffs the debt due from them to T. and Co.: Held, that as the demand of T. and Co. on defendants was for money had and received, the plaintiffs were entitled to recover, on a count for money had and received, against the defendants.

A SSUMPSIT. The declaration contained two special counts, and a count for money had and received, and an account stated. Plea, general issue. At the trial, at the last *Guildhall* sittings, before Abbott C. J.,

the

the facts appeared to be these: The defendants were indebted to *Taillasson* and Co. in the sum of 768*l.*, upon the balance of accounts, for money had and received; *Taillasson* and Co. were indebted to the plaintiffs in a much larger amount; and, being so, they inclosed to the plaintiffs the account current, rendered to them by the defendants, accompanying it with a memorandum at the foot, transferring to the plaintiffs the balance of 768*l.* then due. This being notified to the defendants, a long correspondence between them and the plaintiffs took place, and in the result the defendants, who were creditors to the amount of upwards of 4000*l.* of *Taillasson* and *Doussard* (two of the firm of *Taillasson* and Co.), finding that they could not set off the one debt against the other, sent to the plaintiffs the following note, dated 14th *August*, 1820: "Three months after date we promise to pay Messrs. *Wilson* and *Blanshard*, or order, seven hundred and sixty-eight pounds, due to *Taillasson* and Co., unless otherwise provided for by an arrangement with Mr. *Colton*, in *St. Lucia*, in favour of Messrs. *W.* and *B.*" No arrangement was afterwards made in *St. Lucia* in favour of *Wilson* and *Blanshard*; but Mr. *Colton*, in *St. Lucia*, made an arrangement, and got the following receipt, dated 12th *September*, 1820, from *Taillasson* and Co.: "We acknowledge to have received from Messrs. *W. Coupland* and Co. the sum of seven hundred and sixty-eight pounds sterling, for balance of account due to us on the thirty-first *December* last; which said sum is to be deducted from the balance of account due to them by *Taillasson* and *Doussard* on the date aforesaid." *Abbott C. J.* was of opinion, at the trial, that on the 14th *August*, 1820, the defendants were to be considered as debtors to the plaintiffs in the sum of 768*l.*,

1821.

WILSON
against
COUPLAND.

1881.

WILLIAM
WILSON
COURT OF APPEAL

GASES IN MICHAELMAS TERM

to be paid in three months, subject only to the possibility of intermediate arrangements in favour of Wilson and Blanchard, being made by Mr. Colton, at St. Lucia, and that no such arrangement having been made, the plaintiffs were entitled to recover upon the count for money had and received. The plaintiffs accordingly had a verdict. And now

Murray, by leave, moved to enter a nonsuit. The question is here, whether money had and received will lie. For the plaintiffs failed altogether in the proof of their special counts. The case on which the plaintiffs rely is that of *Israel v. Douglas*. (a) But that case is of doubtful authority. *Wilson J.* there doubted whether money had and received would lie; and in *Taylor v. Higgins*, (b) *Leverett J.* stated that that decision had not been approved. In *Maxwell v. Jameson* (c), the Court held that money paid would not lie, unless money had actually passed. In *Barclay v. Goock* (d), a note is given and accepted as money, and on that ground action was held to be maintainable. This case is effect the assignment of a chose in action. And it is distinguishable from *Israel v. Douglas*, supposing even that case is law; for there there was an absolute promise by *Douglas* to pay the amount due from *Delvalle*: but here the promise is a conditional one in case no arrangement be made in St. Lucia. There must be a consideration for the promise, detriment to the plaintiff, or of advantage

Hen. Bl. 239.

(b) 3 East, 169.
(d) 2 Esp. N. P

fendants. Now, there was no detriment to the plaintiffs; for there was nothing in the terms of the note to prevent them from suing *Taillasson and Co.* for the whole debt due to them. And there was clearly no advantage to the defendants.

1821.

 Wilson
against
Courtland.

ABBOTT C. J. I was not free from doubt at the trial, but I am now satisfied that the verdict is right. The facts are these: The plaintiffs were creditors, and the defendants debtors, to *Taillasson and Co.*; and, by the consent of all parties, an arrangement was made that the defendants should pay to the plaintiffs the debt they owed to *Taillasson and Co.*, and as the demand of *Taillasson and Co.* on the defendants was for money had and received, it seems to me that the defendants, by acceding to this arrangement, made themselves liable for money had and received to the use of the plaintiffs. Thus the case stands, independently of the note. But it seems to me that the note makes no difference; for although it might, perhaps, be at first conditional, yet, afterwards, the condition ceasing, it became an absolute promise; and, if so, the defendants have absolutely acceded, and are liable to the consequences of the arrangement. The verdict, therefore, is right.

BAYLEY J. The legal effect of what has taken place is this; *Coupland and Co.* are indebted to *Taillasson and Co.* to the amount of 768*l.* for money had and received. The latter being indebted to the plaintiffs, a bargain takes place, by which *Taillasson and Co.* agree, that the money had and received by the defendants to their use shall be money had and received to the use of the plaintiffs. To this arrangement the defendants assent. Then their assent makes them debtors, and

1821. liable to an action of money had and received to the use of the plaintiffs. The agreement of the 14th *August* seems to me to be absolute, and not conditional. It is in effect an agreement to give the defendants three months, in which to pay the balance, which is an advantage to them; and the defendants agree to pay it then in *England*, unless the plaintiffs are, in the mean time, paid in the *West Indies*. That is, as it seems to me, an absolute promise. I am, therefore, of opinion that this action is maintainable, and that there ought to be no rule.

HOLROYD J. concurred.

BEST J. A chose in action is not assignable without the consent of all parties. But here all parties have assented, and from the moment of the assent of the defendants, it seems to me that the balance of 768*l.* became money had and received to the plaintiffs' use. It is said that the promise was conditional. That may, perhaps, be doubtful; but supposing it to be conditional, the event has happened upon which it became absolute.

Rule refused.

Saturday,
November 9th.

**Doe on the Demise of FENWICK and Others
against REED.**

Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since: Held, that the original possession having been taken, not under any conveyance, the length of possession was only *prima facie* evidence, from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed.

esquire,

esquire, under whom the plaintiffs claimed, being indebted to *John Rooke*, to the amount of 850*l.*, for which debts *Rooke* had obtained judgment, it was agreed between them, that *Rooke* should be put into the possession of the rents and profits of the estates in question, until the debts should be satisfied therewith, which agreement was carried into effect, and *Rooke* entered into, and remained in possession until 1752. *Edward Charlton*, being at that time indebted also to *John Reed*, under whom the defendant claimed, *Reed* was desirous of getting into the possession of the estates held by *Rooke*, and by a certain indenture of assignment between *Rooke* and *Reed*, the former assigned over all the debt then remaining due, and his right of possession to the estates in question, upon the payment to him of the sum of 575*l.* Under this agreement, *Reed* entered into possession, and he and his family have continued so ever since. In the year 1801, a suit in chancery was instituted by the *Charlton* family, to recover possession of the estates, upon which, in 1821, the Vice-Chancellor directed the present action to be brought, prohibiting the defendant from setting up as a defence, that the debts due or assigned to *John Reed*, deceased, were paid 20 years ago, or that the same were still unpaid. At the trial, it was proved, in addition to the before-mentioned circumstances, that the title deeds relative to these estates, (which deeds, however, extended to other estates also,) were still in the hands of the *Charlton* family, and that the lands being copyhold of the manor of *Wark*, the name of *Rooke* had remained upon the manor books till within a few years, having first appeared there in 1752. It appeared also, that moduses had been paid by the steward of the *Charlton* family, to

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1821.

Dor dem.
FENWICK
against
REED.

1824.

Dou. deo.
Barwick
against
Bayley.

the then rector of *Simonburn*, in 1779, for several estates, including some of the estates in question. There was no distinct evidence of their value. *Edward Charlton* died in 1767, leaving a widow and a son then under age. The son, *William Charlton*, married in 1778, and died in 1797, leaving a son an infant. The question for the jury was, whether, under these circumstances, a conveyance of these estates, either from *Edward Charlton* or *William Charlton* to the *Reed* family, might be presumed. *Bayley* J., who tried the cause at the last assizes for the county of *Northumberland*, in summing up the case, after adverting to the different facts above stated, told the jury, that the real question for them to consider was, whether they believed that a conveyance had actually taken place; observing, that the loss of a deed of conveyance was less likely to take place, than of a grant of a right of way. And that, during the marriages of *Edward* and *William Charlton*, no conveyance could have been made without levying a fine; which being of record, might have been produced, if it had existed. The jury found for the lessor of the plaintiff. And now,

Hullack Serjt. moved for a new trial, on the ground of misdirection. The true criterion by which to judge in these cases, is laid down by *Lord Mansfield* in *Eldridge v. Knott* (a), where he says, "There are many cases not within the statute of limitations, where, from a principle of quieting possession, the Court has thought that a jury should presume any thing to support a length of possession. *Lord Coke* says, that an act of parliament may

(a) Coup. 215.

be presumed, and even in the case of the crown, which is not bound by the statutes of limitations, a grant may be presumed from great length of possession. It was so done in *The Mayor of Hull v. Horner*. (a) Not that in such cases, the Court really thinks a grant has been made, because it is not probable, that a grant should have existed without its being on record, but we presume the fact, for the purpose, and from a principle of quieting the possession." This then is the true principle which ought to have been presented to the jury in this case. And in *Kayser v. Summer* (b), Yates J. directed the jury to presume a grant of a right of way from a possession of nearly 30 years, although it appeared, there had been an absolute extinguishment of the right of way some years back by unity of possession. If the law is to be, as stated here, it will be open in every case of a right of way, or of the enjoyment of ancient lights or water, to go to the jury on the question, whether, although possession for 20 years has been proved, they believe, that in fact any grant was ever made, and evidence of the cautious or imprudent character of the supposed grantor will be receivable. This will, in all probability, make such possession very doubtful; for no one really supposes that such grants have any existence. Besides, if the jury do really suppose a grant to have been made, the length of possession is immaterial. And there was no use in the courts laying down as a rule, that 20 years' possession would warrant a presumption. As to the observations made with respect to the fines, they were not correct. For if there had been, as probably there was a settlement on the respective marriages

1821.

*Dox depy.
Fenwick
against
Hull.*

(a) *Copep.* 102.(b) *Bull. N. P.* 74.

1821.

Dox dem.
FENWICK
against
R.M.

of *Edward* and *William Charlton*, there would have been no necessity for a fine. Possibly that observation, however, may have produced the verdict.

ABBOTT C. J. I am clearly of opinion, that the direction was according to law. In cases where the original possession cannot be accounted for, and would be unlawful unless there had been a grant, the rule may perhaps be different; and all the cases cited are of that description. Here, the original possession is accounted for, and is consistent with the fact of there having been no conveyance. It may, indeed, have continued longer than is consistent with the original condition. But it was surely a question for the jury to say, whether that continuance was to be attributed to a want of care and attention on the part of the *Charlton* family, or to the fact of there having been a conveyance of the estate. As the defendant's ancestors had originally a lawful possession, I think it was incumbent on him to give stronger evidence to warrant the jury in coming to a conclusion, that there had been a conveyance. As to the observations made respecting the fine, &c. I think the Judge might properly tell the jury, that, under such circumstances, they would probably find a fine levied. It is said now, that there might be a settlement, and that he ought to have mentioned that circumstance also to the jury. But it would be a new ground for a new trial, to say, that a Judge had not made every observation to the jury which the ingenuity of counsel could suggest on behalf of their client. I think the point presented to the jury was the correct one. In my opinion, presumptions of grants and conveyances have already

already gone to too great length, and I am not disposed to extend them further.

1821.

Dor dem.
Finwick
against
Reed.

BAYLEY J. I thought at the trial, and I think still, that the question for the jury was, whether in fact a conveyance had ever been made. I considered it as a mere question of fact, and I called their attention to such circumstances as I thought tended to prove, or to negative it. The deeds of 1747 and 1752, were both produced, and if there had been a conveyance, it would probably have been produced also. No draft of it, or abstract referring to it, was produced. A conveyance of this sort was not likely to have been lost, if it had ever existed. It seemed to me, that the verdict was right, and that if the jury had decided otherwise, most mischievous consequences might have resulted.

HOLROYD J. Here the original enjoyment was consistent with the fact of there having been no conveyance, for it was in satisfaction of a debt. The true question was presented to the jury. In cases of rights of way, &c. the original enjoyment cannot be accounted for, unless a grant has been made; and therefore, it is, that, from long enjoyment, such grants are presumed. But even in these cases, evidence to rebut such a presumption would be admissible. I think that the direction of my Brother *Bayley* was correct, and that the verdict is right.

Rule refused. (a)

(a) *Best* J. was absent at chambers.

1821.

*Monday,
November 11th.*

STEWART against BELL.

Insurance from London to Jamaica generally. The goods insured were destined to a particular place in the island, and the usual course in such cases was for the ship to proceed to an adjoining port, and there to tranship the cargo into shallop; but no information of this was given to the underwriters: Held, notwithstanding, that they were liable for a loss occurring after such transhipment on board the shallop.

ACTION on a policy of insurance, from London to Jamaica, upon goods on board the ship *Nesbitt*. Plea, general issue. At the trial, at the last *Guildhall* sittings, before *Best J.*, it appeared that the goods in question were stores for the supply of a plantation called *Duckenfield Hall* estate, situate in *Plantain Garden, River Bay, in Jamaica*. The bay is not safe for vessels drawing so much water as the *Nesbitt* did. The usual course is for such vessels to proceed to *Port Morant*, and to discharge their cargo into shallop for the purpose of being conveyed to *Plantain Garden, River Bay*. The ship *Nesbitt* arrived at *Port Morant* safely, and put part of her cargo on board two shallop, which, in their passage to *Plantain Garden, River Bay*, were lost. For this the assured claimed an average loss. The Solicitor-General, at the trial, contended, that the fact of the goods being destined for *Plantain Garden, River Bay*, ought to have been communicated to the underwriters, and that they could not, upon a policy from London to Jamaica, be liable for a loss occurring after the trans-shipment of the goods. *Best J.* was of opinion, that it was incumbent on the underwriters to inquire, for what part of *Jamaica* the goods were destined, and left it to the jury to say, whether the loss occurred in the usual course of the voyage, telling them that, in that case, the underwriters were liable. The plaintiff accordingly had a verdict. And now

The

The Solicitor-General moved for a new trial; and he referred to a case of *Ferguson v. Allen*, tried before Lord Ellenborough, at Guildhall sittings after Hilary term, 1806, as in point. There the insurance was on goods by the ship *Phoenix*, at and from London to Tobago, and the goods were intended for *Castara Bay*, in that island, but *Castara Bay* not being safe in war-time, or for a ship of the size of the *Phoenix*, she went on to *Courland Bay*, and sent the goods by a drogher, which was captured. There the underwriters were held not liable for the loss. That case is very similar to the present. The circumstance of the goods being transhipped, makes a considerable difference in the risk. No doubt, if the goods had been landed at *Port Morant*, the underwriters would have been liable for any loss by boats. Besides, the risk in droghers, when intended to be borne by the underwriters, is specially mentioned in the policy.

1821.

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STEWART
against
BELL.

Per Curiam: The assured must shew, that the port to which the ship proceeds is the usual port for goods destined to the particular place: That was so here, for *Port Morant* was the place to which ships of the burthen and draught of water of the *Nesbitt* usually proceed with goods destined for *Plantain Garden*; *Riber Bay*. The underwriter is presumed to be acquainted with the usual course of the voyage, and to take a premium for the risk accordingly. The policy is to cover the goods till they are landed; and the underwriter should inquire, therefore, what is the usual mode of landing the goods insured. Here, it appears to have been the usage to tranship the goods into small boats. The words "including risk in droghers" have probably been added to policies for greater security; but where it is the usage of the trade,

and

1821.

 STEWART
against
 BELL.

and in the ordinary course of the voyage, to tranship into droghers, the underwriters are liable, even though those words are not found in the policy.

Rule refused.

Monday,
 November 11th.

SHEPHERD *against* KAIN.

Where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding, that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened. Held, that notwithstanding the words, "with all faults, &c." the vendor was liable for the breach of the warranty.

CASE for the breach of a warranty as to the character of a ship. The advertisement for the sale of the ship described her as "a copper-fastened vessel;" but there were subjoined these words: "The vessel, with her stores, as she now lies, to be taken with all faults, without allowance for any defects whatsoever." It appeared at the trial, at the last *Guildhall* sittings, before *Best J.*, that the ship, when sold, was only partially copper-fastened, and that she was not what was called in the trade a copper-fastened vessel. It appeared, also, that the plaintiff, before he bought her, had a full opportunity to examine her situation. *Best J.* thought that the ship, not being a copper-fastened vessel, the plaintiff was entitled to a verdict, and directed the jury accordingly. And now

The Solicitor-General moved for a new trial. He referred to the terms of the advertisement by which the vessel was to be taken, with all faults, and without any allowance for any defects whatsoever; and to the judgment of Lord *Ellenborough* in the case of *Baglehole v. Walters*. (a) Here the term "copper-fastened" was only a description to the best of the seller's judgment.

(a) *3 Campb. 156.*

But

But, *per Curiam*. The meaning of the advertisement must be, that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold "with all faults," and it turns out to be plated; can there be any doubt that the vendor would be liable? "With all faults" must mean with all faults which it may have consistently with its being the thing described. Here the ship was not a copper-fastened ship at all; and, therefore, the verdict was right.

1821.

 SUGGESTED
against
KALM.

Rule refused.

BURNYEAT against HUTCHINSON.

 Tuesday,
November 13th.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial, at the last assizes for Cumberland, before Bayley J., it appeared that the action was brought to recover the amount of a tavern bill, the charge for which amounted to 1*l.* 13*s.* There was also a charge for spirituous liquors supplied to the guests, amounting to 8*s.* To this charge it was objected, that it could not be recovered in consequence of 24 G. 2. c. 40. s. 12.; and *Gilpin v. Rendle* (*a*) was cited. The learned Judge was of this opinion, and the jury, under his direction, having found a verdict for 1*l.* 13*s.*, he afterwards certified, in order to deprive the plaintiff of his costs.

A plaintiff, in an action for a tavern bill, is not entitled to recover for any items under 20*s.* for spirits supplied to the guests, such sales being prohibited by 24 G. 2. c. 40. s. 12.

D. E. Jones now moved to increase the verdict to 4*s.* by adding the charge for spirituous liquors. Here, the

(*a*) 1 Sch. N. P. 61.

Vol. V.

R

liquors

1821.

BURNTET
against
HUSKINSON.

liquors were only incidental to the rest of the entertainment. The object of the statute was to prevent the sale to the consumers in small quantities, where spirits only were sold. It speaks of a collusion between the distiller and retailer, in order to extend the sale. If this be the rule, as here laid down, any security given for a tavern-bill, in which there was a charge of a glass of spirits, would be invalid; and so, indeed, it was held in *Scott v. Gillmore* (*a*), where the spirits were supplied to the party. But in *Spencer v. Smith* (*b*), where the bill was given by an officer for spirits supplied to recruits, Lord *Ellenborough* was of a contrary opinion; and in *Jackson v. Attrill* (*c*), where the spirits were supplied to the keeper of an eating-house, to be consumed by his customers, Lord *Kenyon* held him liable. Here, the goods were supplied to other persons, and not to the defendant, who was not present at the entertainment.

ABBOTT C. J. The words of the act are free from doubt. They contain a general and absolute prohibition of the sale of spirits, unless delivered in quantities amounting to more than twenty shillings in value at one time. We are, however, desired to narrow the construction, by introducing the qualifications of a sale to the consumer himself, and by confining it to the case where the spirits have been sold alone. But it would be a great evil to introduce such qualifications; and I think, if we did so, we should probably defeat the intentions of the legislature. The verdict must remain as it is, with all its consequences.

Rule refused.

(*a*) 3 *Tenn.* 226. (*b*) 3 *Campb.* 9. (*c*) *Peake, N. P. C.* 180.

1821.

DOCE on the Detinse of JAMES against BRAWN. Tuesday,
November 15th,

EJECTMENT for certain leasehold premises. Plea general issue. At the trial, before Abbott C. J., at the last assizes for Gloucestershire, it appeared that a fieri facias had issued upon a judgment against the defendant, and that on that occasion a lease by deed of the premises in question, was taken in execution by the sheriff, and sold and assigned to the lessor of the plaintiff. The only question at the trial was, whether this assignment by the sheriff was sufficiently proved. The assignment was in the name of Mr. Miller, the high-sheriff, and was executed in his name, and under the seal of the office by Mr. Wilton, who acted as his under-sheriff. But there was no evidence of the appointment of Wilton, empowering him to execute deeds in the name of the high-sheriff. The learned Judge thought that Wilton's acting as under-sheriff, was sufficient evidence of his appointment, and that it must be presumed that he had authority to execute all instruments necessary to be executed by the high-sheriff, and the plaintiff accordingly had a verdict. And now

Where an assignment of a lease by deed, taken in execution, was made in the name and under the seal of office of the sheriff, by A. B., acting as under-sheriff: Held, that such assignment was sufficiently proved, without proving further the appointment of A. B. as under-sheriff, and that he had power by deed to execute deeds in the name of the sheriff.

Campbell, by leave of the learned Judge, moved to enter a nonsuit; contending, that there ought to have been further evidence that Wilton was under-sheriff, and that he had authority by deed to execute deeds in the name of the high-sheriff.

CASES IN MICHAELMAS TERM

1821.

Dor dem.
James
against
BROWN.

But *The Court* thought that the evidence was sufficient, and that the under-sheriff had authority virtute officii to execute such instruments: and they refused the rule.

Rule refused.

Tuesday,
November 15th.

RHODES against GENT.

A bill of exchange was accepted, payable at Messrs. P. and H., bankers, London, but was not presented there for payment when due, nor until some days after: the acceptor is still liable, no inconvenience having resulted to him from the delay to present the bill.

ACTION against defendant, as acceptor of a bill of exchange drawn by the plaintiff, payable four months after date to the plaintiff's order, for the sum of 194*l.* The acceptance was as follows: "Accepted; payable when due at Messrs. P. and H., bankers, London." The declaration contained an averment, that "afterwards, and when the bill became due, to wit, on, &c., at, &c., it was presented at the place at which it was by the said acceptance made payable, and payment demanded." At the trial, at the last *Guildhall* sittings, before Abbott C. J., it appeared that the bill in question had not been presented for payment at Messrs. P. and H. till several days after it became due; and it was objected that, on this ground, the plaintiffs were not entitled to recover: but the Lord Chief Justice was of a different opinion. The plaintiffs having obtained a verdict upon this, and upon another bill of exchange, to the proof of which there was no objection,

J. Parke now moved to reduce the verdict, by deducting the sum of 194*l.* Here the bill was not presented when due. It is now decided, that in an acceptance like the

the present, it is a part of the contract that the bill shall be presented at the particular place; *Rowe v. Young* (*a*): and the question is, therefore, whether the law will not now annex to it also the condition of presenting the bill at the banker's within a reasonable time after it is due. A party, in order to take up the bill, deposits money at his banker's, and, if the bill be not presented for payment when due, or within a reasonable time after, he will be exposed to the inconvenience and risk of keeping the money there for a long period of time. And *Bishop v. Chitty* (*b*) is an instance of a loss occurring from this circumstance, where the acceptor was held not to be liable. *Sebag v. Abitbol* (*c*), was decided on the ground that it was not necessary to present the bill at all at the banker's, and being, as to that, overruled by *Rowe v. Young*, is not an authority against the application. Besides, here there is an averment in the declaration, that the bill was presented when due, which has been negatived.

1821.

Rowe
against
George

ABBOTT C. J. It does not seem to me that the particular averment in the declaration is at all material; for the bill being payable to the order of the plaintiff, who was the drawer, it would, unless he was guilty of laches, be evidence on the account stated. The question, therefore, really is, whether a mere omission to present the bill at the banker's on the day when it is due, will discharge the acceptor; and, it seems to me, that if we were so to decide, it would produce most mischievous consequences. The case of *Rowe v. Young* goes the length of holding that a presentation is

(*a*) 2 B. & B. 165. (*b*) 2 Str. 1195. (*c*) 4 M. & S. 482.

CASES IN MICHAELMAS TERM

1821.

~~Decrees
against
Best.~~

necessary at the particular place specified ; and, perhaps, it may go further, and may exonerate the acceptor, in case, by the omission to present in time, he sustains any actual prejudice ; but it cannot extend to a case like the present, where no such injury is proved to have arisen in consequence of the omission to present the bill for payment when due. This rule must, therefore, be refused.

HOLROYD J. (a) If this case fell within the rule laid down in the case of *Rowe v. Young*, we are, no doubt, bound by that decision ; but I think it does not fall within it. The only cases in which parties have been held to be exonerated in consequence of non-presentment, are those of drawers and indorsers. This is an action against the acceptor, and, without saying what effect the proof of an actual loss sustained by him in consequence of an omission to present would have, I think he is clearly not exonerated in the present case, where no injury is proved to have arisen from what has occurred.

BEST J. If I had thought that a consequence like that contended for was deducible from *Rowe v. Young*, I should have hesitated before I pronounced the opinion which I did in that case. If a bill be accepted, payable at a particular place, the acceptor undertakes to have the money there, and to leave it there till the bill is presented ; and if he does so, and in consequence of that, by the failure of the banker, he receives an injury, I think he will be exonerated, if the bill has not been presented in due time. It is like the case of a check,

(a) Bayley J. was absent at Chambers.

which,

which, if it be held till after the banker fails, will be considered as payment, in case the person giving it had money in the banker's hands at the time. I am satisfied that the case of *Bowe v. Young* cannot be considered as having imposed the condition contended for in the present case. This rule must, therefore, be refused.

1821.

 RHODES
against
GENT.

Rule refused.

ALEXANDER against SOUTHEY.

*Wednesday,
November 14th.*

TROVER for printing types and other goods. Plea general issue. At the trial at the last *Guildhall* sittings before *Best J.*, it appeared, that the defendant, who was the servant of the *Albion Insurance Company*, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the plaintiff's house, and which had been carried to the warehouse by the servants of the Company. The only evidence of a conversion was, that when the plaintiff demanded the goods from the defendant, the latter said that he could not deliver them up without an order from the *Albion Office*. The learned Judge left it to the jury to say, whether this qualification of the defendant's refusal was a reasonable one, telling them, that if so, he was of opinion, that there was not sufficient evidence of a conversion. The jury accordingly found a verdict for the defendant. And now

Where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them up refused to do so without an order from the company: Held, that this was not such a refusal as amounted to a conversion of the goods by the defendant.

Denman moved for a new trial, on the ground of a misdirection. Here, there was a tortious intermeddling with the plaintiff's goods, by the defendant's refusal to

1821.

ALEXANDER
Judge
Sergeant.

deliver them up. This was therefore a conversion, and *Perkins v. Smith* (*a*), and *Stephens v. Ebwall* (*b*), were both instances where servants were held liable for a conversion, although it was done for the benefit of their masters. These authorities are in favour of the plaintiff in this case.

ABBOTT C. J. I am of opinion, that in this case there should be no rule. *Perkins v. Smith* and *Stephens v. Ebwall* were both cases of actual conversion by servants, in disposing of goods the property of others, to their master's use: but, here the question is, whether the refusal of the servant to deliver the goods in question amounts to a conversion of the property. This therefore is the case of a conversion arising by construction of law. I think the refusal in this case, not being an absolute refusal, was not sufficient evidence of a conversion, and that the learned Judge was right in so considering it, and in directing the jury to find a verdict for the defendant.

BAYLEY J. If the plaintiff in this case had informed the defendant, that he had previously made application to the Insurance Company, and that they had refused permission for the delivery of the property, or had told the defendant, that he expected him to go and get an order, authorizing the delivery of the property, and after that, the defendant had refused either to deliver the goods or to go and get such order, I think it would have amounted to a conversion on his part: but here the defendant had the goods in his possession as

(*a*) 1 Wilson, 328.

(*b*) 4 M. & S. 260.

the

the agent of the Insurance Company, and he would not have done his duty if he had given them up without an application to his employers. He only gave, as it seemed to me, a qualified, reasonable, and justifiable refusal.

1821.
ALEXANDER
SOUTHEY.

HOLROYD J. I think the verdict in this case was right. In point of law, the goods were only in the custody of the defendant, and in the possession of his employers, the Insurance Company. If we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house, and to ask his servant to deliver goods to him, and the servant were to refuse to do so, unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case, the goods came into the defendant's possession lawfully, and the refusal is only till an order is obtained from the defendant's employers. In *Perkins v. Smith*, the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now it is clear, that the authority of the master would not amount to a defence of that which was altogether a tortious act of the servant. The case of *Mires v. Solehay* (*a*) is an authority in point. There, the servant refused to deliver back some sheep which were on his master's land; and it was held to be no conversion on his part. I am therefore of opinion, that the rule should be refused.

BEST J. I thought at the trial, that I might properly have nonsuited the plaintiff, but that the safer

(a) 3 Mod. 242.

1821.

~~ALEXANDER
against
SOUTHERN.~~

course was to leave the question to the jury. As unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is, whether it be a reasonable one. Here, the jury thought the qualification a reasonable one, and that the refusal did not amount to a conversion of the property, and I think they were right in that conclusion.

Rule refused.

*Friday,
November 16th.*

JAMESON and Another *against* CAMPBELL.

Where a bond was given under 4 G. 3. c. 33. s. 1. by a member of parliament, being a trader, and, after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that the bankruptcy and certificate were no discharge to the bond.

DEBT ON bond. The defendant pleaded his bankruptcy and certificate, the latter being dated 22d June, 1818. The replication set forth the condition of the bond, by which it appeared to have been a bond with securities given under 4 G. 3. c. 33. s. 1, conditioned for the payment of such sum as should be recovered in a certain action, then pending in the Common Pleas between the plaintiffs and defendant, together with such costs as should be given in the same. And it then averred, that after the bankruptcy, to wit, in Easter term, 59 G. 3., judgment was given in that action in the Common Pleas against defendant, for the sum of 289*l.*, and so the bond forfeited by non-payment of that sum. Demurrer and joinder. This case was argued in last Easter term by

Wilde, in support of the demurrer. This bond given under 4 G. 3. c. 33. s. 1. was a mere collateral security, and

and is discharged by the bankruptcy and certificate. The difficulty arises from confounding the security and debt. The debt is not contingent, although the security is so. The moment the debt was ascertained by the judgment, it became by relation, a debt due before the bankruptcy, and as such, it was provable under the commission, and is discharged by the certificate. The security is indeed, contingent, and depends on the event of the judgment. Here, the original debt has been released by the certificate, and the bond, which was only a security for it, cannot now be enforced. *C. Litt.* 291. 6. For the certificate may be considered as a statutory release of the debt, *Vansandau v. Corshie* (a), *Scott v. Ambrose*. (b) In *Hunter v. Campbell* (c), the Court only decided, that they would not interfere, on motion, in a case like the present. This case is analogous to bail, where the Court relieve the bail on motion, when the principal debtor has obtained his certificate.

1821.
—
Actions
against
Camerl.

Parke contra, referred to the statute 7 G. 1, c. 31, ss. the authority by which bonds were first made provable, and to *Callowel v. Clutterbuck*, cited in *Tully v. Sparkes* (d) as proving that point. Under that statute, however, the time of payment must be certain, for a rebate of interest is to be calculated, *Ex parte Barker* (e). Here the time is clearly contingent, for it could not be ascertained when judgment would be given. There are many cases where it depends on the nature of the security, whether it be barred by the certificate, as, for instance,

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| (a) 3 B. & A. 15. | (b) 2 M. & S. 326. |
| (c) 3 B. & A. 273. | (d) 2 Sir. 867. |
| (e) 9 Ves. Jun. 110. | |

an.

1821.

JAMESON
against
CAMPBELL.

an annuity bond, and a covenant to secure the annuity, if the bond be forfeited before the bankruptcy, it may be proved. But in an action on the covenant for not paying subsequent instalments, the certificate would be no bar. *Cotterel v. Hooke* (a), *Ex parte Granger* (b). So a certificate obtained subsequently to the judgment in an action on a bail bond, was held not to discharge the bankrupt from the judgment; the bail bond not having been forfeited at the time of the bankruptcy, *Cockerill v. Owston* (c), although it was there admitted, that the original debt was thereby discharged. Here the certificate was obtained after the judgment in the Common Pleas, and *Bouteflour v. Coats* (d), and *Dinsdale v. Eames* (e), shew that in such a case it is no bar. Nor will this be any hardship on the defendant, for, by suing the sureties, who are clearly liable, he may be made liable circuitously, and the law abhors circuity of action.

Wilde, in reply, referred to *Utterson v. Vernon* (f), as shewing that 7 G. I. c. 31. was a declaratory act. The cases as to bail bonds are distinguishable, for the condition of the bail bond is not, as here, to pay the debt, but to do a collateral act.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court; and, after stating the pleadings, proceeded as follows: — This case was argued before us in the last *Easter* term. It is an action on a bond, given in pur-

(a) *Dougl.* 97.

(b) 10 *Ves. jun.* 351.

(c) 1 *Burr.* 456.

(d) *Cowp.* 25.

(e) 2 *B. & B.* 8.

(f) 3 *T. R.* 546.

snuance of the statute 4 G. 3. c. 33. which has been since amended and rendered effectual by the statute 45 G. 3. c. 124. It appears by the pleadings that the plaintiffs having recovered judgment in the original action on a bill of exchange, the debt and costs remaining unpaid, afterwards brought their present action. Pending the proceedings in the original action, and before judgment obtained therein, the defendant became a bankrupt, and a commission was taken out against him, under which commission, but not before judgment in that action, he obtained his certificate. This certificate undoubtedly operated as a discharge in law from the debt due on the bill of exchange, and also from the costs of the action upon the bill; the costs being considered, as to this point, only as an accessory to the debt. And it was contended on the part of the defendant, that being thus discharged from the payment of all that was recovered by the judgment in the first action, he is, by consequence, discharged also from the bond given to secure the payment of what should be so recovered. But we think this consequence does not follow from the premises. There may be two securities for the same payment, one of which shall be barred by a certificate, and the other not barred. Thus, if the grantor of an annuity executed a deed of covenant for payment of the annuity as it should from time to time accrue due, and also a bond in a penal sum, with a condition for the like payment, if the bond was forfeited, so as to make the penalty a debt at law before bankruptcy, a certificate afterwards obtained discharged the grantor from all suit on the bond, as well for future as prior payments of the annuity; but such a certificate did not discharge him from

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JAMESON
against
CAMPBELL.

1821.

*JAMISON
against
CAMPBELL.*

from his deed of covenant, as it respected future payments, until the statute 49 G. 3. c. 121. was passed.

So, if a person, being arrested, give a bail-bond, conditioned for his appearance in court to answer in a suit for a debt, and become bankrupt between the execution of the bond and the time of appearance, so that the bond is not forfeited before his bankruptcy, if he do not afterwards appear to the suit, whereby the bond becomes forfeited, and an action be brought upon it, and he obtain his certificate after judgment in that action, the certificate, although it operates as a discharge from the debt for which the original action was brought, does not operate as a discharge from the judgment obtained in the action upon the bond. (a) It is true, that the condition of such a bond is not for payment of the debt; but nevertheless the bond is, in effect, a security only for such payment; and, although a judgment in the action on the bond be given for the penalty, yet execution can be taken out only for the original debt, together with costs, and not for the full penalty of the bond. And we think the bond in question is more analogous to a bail-bond than to any other instrument or deed in common use. The defendant was a member of parliament, privileged from arrest; and, consequently, could neither be required to give a bond to any sheriff for his appearance to an action, nor to give bail in court to any action in the usual way. This was found to be inconvenient; because a trader, who happened to be a member of parliament, being relieved from the fear of personal arrest, might, for a

(a) *Cockerill v. Owston*, 1 Burr. 436.

long

long time, avoid the committing any of the usual acts of bankruptcy, and thereby delay his creditor from the relief afforded by a commission of bankrupt. To remedy this inconvenience, the statute 4 G. 3. c. 38. was passed, which, upon a bill filed in court, on an affidavit of debt, and other circumstances therein mentioned, requires the trader, within two months after personal service, to pay, secure, or compound for the debt, or to give a bond with sureties like the present; or, in default, provides, that he shall be accounted a bankrupt, and subjected to a commission at the suit of any creditor. A bond so given was undoubtedly intended as a substitute for that security, which, in other cases, is obtained through the medium of an arrest, though the statute is imperfectly framed with a view to the intended object. The effect of a certificate to discharge a bankrupt from a judgment obtained between bankruptcy and certificate, depends upon the provisions of the statute 5 G. 2. c. 30. ss. 7. and 13. Those provisions are, in their terms, confined to the original judgment, and do not extend to a security given for payment of the sum that may be thereby recovered. And, therefore, the persons who become bail in court cannot plead in their discharge the certificate of their principal; and the ground upon which the courts relieve them, on motion, is, that the bankrupt, if surrendered by them in performance of their recognizance, is entitled to his immediate discharge; and to oblige them to surrender him, in order to relieve themselves, would be a vexation to him, and a useless expence to all parties. But considering the effect of a bond like the present with reference to the law as it stood before the provision respecting sureties, introduced by the statute

1821.

*Jackson
against
Cassell.*

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1821.

JAMESON
against
CAMPBELL.

49 G. 3. c. 121., the persons who joined as sureties in such a bond had no means of relief. They were undoubtedly liable to an action on the bond; and if compelled to pay, under the circumstances of the present case, might undoubtedly have sued the bankrupt for reimbursement; so that if he should have been held discharged from a direct action upon the bond against himself, he would not have been discharged from the effect and consequences of the bond, but might have been made liable indirectly, through the medium of his sureties, and for their reimbursement. And circuity of action is always to be avoided, which would afford an additional reason for holding him liable directly, and in the first instance, by an action against himself on the bond. And as we think this case must be decided, with reference to the law as it existed before the statute 49 G. 3., it is not necessary to consider the effect of that statute, which, whatever it may be, is certainly confined to matters between the sureties and their principal, and does not touch the rights or remedies of the original creditor. For these reasons, we are of opinion that judgment should be given for the plaintiffs.

Judgment for the plaintiff.

1821.

COVERLEY against BURRELL.

Friday,
November 17th

ASUMPSIT for money had and received, to recover from the defendant, an auctioneer, the amount of a deposit paid on the sale of an annuity. The cause was tried at the London sittings after Michaelmas term, 1817, before Lord Ellenborough C. J., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

On the 20th June, 1817, the defendant put up for sale the annuity in question, under the following printed particulars: "Waterloo Bridge annuities. Particulars and conditions of sale of an annuity, payable out of, and secured on, the tolls of the Waterloo Bridge, which will be sold by auction by the defendant, at Garraway's coffee-house, pursuant to an order of commissioners of bankrupt. Lot 1. an annuity of 64*l.* per annum, payable half-yearly, well secured, and payable on the first tolls arising from that valuable concern the Waterloo Bridge, which will open for passengers on the 18th day of this month, with interest thereon." At the sale the plaintiff was the highest bidder, and was declared the purchaser of lot 1. for 580*l.*, and immediately paid his deposit on that amount, agreeably to the conditions of sale, and signed a memorandum of the contract. The defendant was employed, in his character of auctioneer, to sell the annuity in question, which had been granted by the Waterloo Bridge Company to one Stephens, a bankrupt. By the deed of grant, it appeared that the company

By a public act the Waterloo Bridge Company were authorised to raise money for the purpose of completing their undertaking, either among themselves, or by the admission of new members, or by granting annuities for term of years, or for life. The act did not contain any provision that the annuities should or should not be redeemable. The Company however, in the original grant, reserved to themselves a power of redemption: Held, under these circumstances, that an auctioneer, putting up to sale one of these annuities, was bound, in his particulars of sale, to describe it as a redeemable annuity.

1821.

COVERLEY
against
BURKE.

reserved to themselves a right to redeem the annuity at the expiration of five years.

Sugden, for the plaintiff. The auctioneer ought to have disclosed by his particulars the redeemable quality of this annuity. The purchaser might fairly assume that it was irredeemable, especially as the act of parliament enabling the commissioners to grant these annuities, although it contains a form of grant, does not expressly give a power of redemption. He was then stopped by the Court.

Barnetwall, contra. The rule of law, "caveat emptor," applies to this case. The annuity was granted originally by the *Waterloo Bridge Company*, for the purpose of raising money to enable them to carry on a great public undertaking; and although a power of redemption does not necessarily belong to every annuity, yet it almost universally attaches to an annuity granted for such a purpose; for the mode of raising money by annuity is resorted to only when it cannot be obtained upon mortgage or by other means. The circumstances under which this annuity was granted must be taken to have been known to the purchaser; for it was granted originally under the provisions of a *public* act of parliament, the 53 G. 3. c. 184. By section 6. of that act, the company are authorized to raise £100,000*l.* for the purpose of completing their work, either among themselves or by the admission of new subscribers; by section 7. they are authorized to raise it by mortgage; and by section 8. by granting annuities payable out of the rates, either for a term of years or for life.

life. The purchaser, therefore, in this case, must be considered to have known that he was purchasing an annuity for life or years (which would pay him 11 per cent. on his purchase-money), originally granted by persons for the purpose of enabling them to carry on a great public work. He ought, therefore, to have known that the original grant of an annuity must, according to the common course of such dealings, have contained a power of redemption; or, at least, that fact was so very probable as to throw upon him the obligation of making enquiry upon the subject.

1821.

Coykell
against
Burrell.

ABBOTT C. J. I am of opinion that the plaintiff is entitled to recover. It is of great consequence to the public that auctioneers, who take upon themselves to describe in their particulars the property to be sold, should truly describe it; for the buyers act on the faith of those descriptions. We ought not, therefore, to be astute in curing the defects which are apparent on the face of these particulars. It is true that an annuity may be redeemable, but it is not necessarily so; and it is not redeemable, unless there be a special provision to that effect in the deed granting it. The purchaser had no reason to suppose, in this case, that the annuity was redeemable. He could not have learnt that from the act of parliament, which contains no provision to that effect. And, under these circumstances, it appears to me that he might naturally expect that he was to purchase an absolute, and not a redeemable, annuity. I am of opinion that, in the present case, it was incumbent on the auctioneer, who offered the annuity for sale, to describe it as a redeemable annuity. There must, therefore, be judgment for the plaintiff.

1821.

COVERLEY
against
BURRELL.

BAYLEY J. I am of the same opinion. If this had been a common annuity, it might naturally have been supposed that a purchaser would make enquiries as to its nature; but, here, it was granted under the provisions of an act of parliament, and the purchaser, by looking at the act, might reasonably expect to find the nature of the annuity. Now, by the 8th section of the act, he would learn that the company were at liberty to grant any annuity, for any term of years, or for the life of the grantee, or his nominee; and that, in the 9th section, a form of grant is given. Now, both these clauses being silent as to the annuity being redeemable, he would be fully warranted in concluding either that the annuity on sale was for a term of years or for a life, and he could not have any idea that it was a redeemable annuity. I think, therefore, the plaintiff is entitled to recover back the deposit.

HOLROYD J. Under the provisions of this act, a purchaser would naturally expect that this annuity was not redeemable. I, therefore, concur in thinking that the plaintiff is entitled to judgment.

Judgment for the plaintiff. (a)

(a) *Best J. was absent in the Bail Court.*

1821.

KIPLING *against* TURNER.Tuesday,
November 20th.

DEBT on bond. The defendant craved oyer of the condition, which was as follows: Whereas *G. N., I. T., and I. T. N.*, have lately filed their bill of complaint in chancery, against *R. M. and I. S.*, defendants, touching the matters therein contained. Now the condition of this obligation is such, that if the above bounden, *George Turner*, his heirs, &c., do, and shall well and truly pay, or cause to be paid, all such costs as the said Court shall think fit to award to the defendants on the hearing of the said cause, or otherwise, then this obligation to be void, &c. And he then pleaded, first, that the said Court, in the said condition mentioned, had not awarded any costs to the said defendants, *R. M. and I. S.*; and secondly, that after the execution of the bond, and before the said Court had awarded any costs to the said *R. M. and I. S.*, to wit, on, &c. at, &c. the said *I. S.* died. Replication to the first plea, that after the death of *I. S.*, by the custom and practice of the said Court, he, the said *R. M.*, was entitled to certain costs. And that after the death of *I. S.*, by a certain order of the said Court, made in the said cause, it was ordered, that the plaintiffs should pay to the said *R. M.* his costs, to be taxed, &c. and that the costs were afterwards taxed at 3*l.*, and that defendant had not, though requested so to do, paid the same. And as to the second plea, demurrer. The defendant also demurred to the replication to the first plea.

The condition of a bond, after reciting that *A., B., and C.* had filed a bill in equity against *D. and E.*, was, that the obligee would pay all such costs as the Court of Chancery should award to the defendants, on the hearing of the cause: Held, by three Justices (*Abbott C. J. dubitante*), that the death of *E.*, before any costs awarded, could not be pleaded in discharge of the bond.

1821.

~~KIRKING
against
TUNNEY.~~

J. Williams, for the plaintiff. The question here is, whether the bond be discharged by the death of one of the parties, who were defendants in the original suit in chancery. These conditions are to be construed liberally, and every reasonable intendment must be made to effectuate the object of the parties. That object in this case was clearly, to indemnify the plaintiffs in the suit in equity against any costs they might incur therein. There is not any thing in the condition which at all refers to the death of one of the defendants in equity, as an event in which the bond is to be at an end. The condition is to indemnify against any costs, if they accrue. In *Com. Dig. Tit. Condition L. 1.*, it is laid down, that if a condition be to enfeoff two before such a day, and one dies, the party ought to enfeoff the other.

Littledale, contra. This is the case of a surety, and the condition is, that he will pay all such costs as shall be awarded to *R. M.* and *I. S.* and in such a case, if *I. S.* dies the bond is discharged. The principle on which cases of this sort depend, is founded on *Lord Arlington v. Merricke*. (a) And *Wright v. Russel* (b), *Barker v. Parker* (c), and *Strange v. Lee* (d), are authorities to shew, that a bond given for the faithful discharge of a clerk's duties to *A.* and *B.*, is discharged by either the death of *A.* or *B.*, or by a change of the firm, by introducing a third person. And the reason given, is, because the surety might have a special reliance on *A.* or *B.*, which induced him to enter into the obligation. So again, he will not be liable beyond the particular time

(a) 2 Saund. 414. a.

(b) 3 Wilson, 530. 2 Blackst. 934. S. C.

(c) 1 T. R. 287.

(d) 3 East, 484.

mentioned in the condition. Here, the death of *J. S.* may perhaps have been a cause of the costs having been incurred. And there is no averment in the replication, that the costs accruing were such as would have accrued in case *J. S.* had survived.

1621.

KIRKMAN
against
TURNER.

Abbott C. J. My mind is not quite satisfied upon this case, because, the situation in which defendants in equity stand as to costs, is not the same as at law. For, in equity, the Court sometimes orders the plaintiff to pay costs to one defendant, and to receive them from another, and if that had been done here, this defendant would have received the advantage. I doubt therefore, whether we can properly introduce the words "or either of them," into the condition of this bond, in order to satisfy the intention of the parties. The inclination of my opinion is, therefore, in favour of the defendant; but, as the rest of the Court are of a different opinion, and entertain no doubt upon the subject, the judgment must be for the plaintiff.

Batley J. This bond is not conditioned to pay such costs as the court of equity shall award to *R. M.* and *J. S.* by name, but to pay such costs as shall be awarded by that court to the defendants, and I think, that the meaning of that is, that the present defendant undertakes to pay all such costs as shall be awarded by the Court to those who at that time fill the character of defendants in equity. The case is very different where persons are described by character, and where they are described by name. If, for instance, a man makes *A.*, *B.*, and *C.*, his executors, and directs that *A.*, *B.*, and *C.* shall sell his property, then if *A.* dies,

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against
TUNNER.

B. and C. cannot sell it, but if he directs his executors to sell it, B. and C. may do so. In this case, therefore, I think that if any costs were awarded to persons filling the character of defendants in equity, they would be within the bond, and here it appears by the replication, that there were costs so awarded. I am therefore of opinion, that there should be judgment for the plaintiff.

HOLROYD J. I entirely agree in the opinion pronounced by my Brother *Bayley*. It appears, that here, there were three persons filling the character of plaintiffs, and two, that of defendants in equity, and the intention appears to me plainly to have been, that whatever costs the plaintiffs in equity were compelled to pay, should be repaid by this defendant. I think, therefore, that the plaintiff is entitled to our judgment.

BEST. J. The object of the Court is to ascertain the intention of the parties, which it is not very easy in this case to do. I think, however, that it was this. The defendant undertook, that if the persons mentioned in the condition would file a bill in equity, he would be responsible for all the costs which might be awarded against them by the Court. I agree, therefore, that in this case, the plaintiff ought to recover.

Judgment for the plaintiff. (a)

(a) See *Barclay v. Lucas*, 1 Term Rep. 291. (note a.), where the security was given to the banking-house, and not to the partners by name, and there the surety was held to be liable, notwithstanding a change of the firm.

1821.

Lewis and Others against Ovens.

CAMPBELL had obtained a rule to shew cause why "Where a plaintiff in error resides out of the jurisdiction of the Court, he may be compelled to give security for costs; and, in default thereof, the defendant in error will be permitted to proceed on his judgment, notwithstanding the writ of error."

the defendant, who had sued out a writ of error in this case, should not give security for costs, or why the plaintiffs should not be at liberty to proceed on the judgment, notwithstanding the writ of error. It appeared that the defendant resided in *Ireland*, and that the writ of error was brought after a sham plea, and judgment upon demurrer to the replication.

Marryat and **Chitty** shewed cause, and contended, that this was distinguishable from the cases in which the Court requires security for costs, where a plaintiff resides out of the jurisdiction of the Court. Here, if the security be not given, the party will be liable to be taken in execution. In other cases, the proceedings are only stayed in the mean time.

Campbell, contra, stopped.

Attorn C. J. This is quite analogous to the cases referred to, and it is even a more favourable case for such an application. The present rule, if made absolute, will not stop the party from proceeding in his writ of error, if he has any substantial ground for it. But unless he gives security for costs, the other side may, in the mean time, proceed on their judgment.

Rule absolute.

1821.

In the Matter of SALISBURY.

A tipstaff is entitled to take a fee of six shillings, and no more, for conveying a prisoner from the Judge's chambers to the King's Bench.

SALISBURY in person had obtained a rule nisi for one of the tipstafs of the Court, to answer the matters of his affidavit. The affidavit stated, that the tipstaff had taken a fee of half a guinea for conveying him from the judge's chambers, (to which he had been brought by habeas corpus) to the King's Bench prison, such fee being more than he had a right to demand, according to the table of fees affixed in the King's Bench, in pursuance of a rule of this Court.

Gurney and *Platt* shewed cause upon affidavits, stating, that the fee had been taken for a very long period of time by all tipstafs in both courts, and that it was allowed by the master in costs.

The Court, however, adverting to the statutes 2 G. 2. c. 22. s. 4., and 32 G. 2. c. 28. s. 5., and the rule of court of Michaelmas term, 3 G. 2., and the table of fees settled in the following year, said, that it was clear, that the tipstaff had no right to take any other fee for taking a prisoner from the judge's chambers to the King's Bench prison, than six shillings, which was the fee allowed him in that table. They, therefore, ordered the fee so taken to be returned to the complainant. (a)

(a) See the table of fees in the rules of the King's Bench, p. 241.

1821.

BURTON, Children, and BURTON *against* ISSITT.

A RULE nisi had been obtained for discharging the defendant out of custody, on the ground of a defect in the note delivered to him, for the payment of the sixpences under the *Lords' act*. The action was brought by the three plaintiffs. *Children*, however, had ceased to be a partner before the note was given, which was in this form, "*J. Burton, for self and partiers.*"

Jeremy now shewed cause upon an affidavit, stating, that all the plaintiffs were in partnership at the time when judgment was recovered; and that, by the deed of dissolution of partnership, power was given to the remaining partners, to use the name of *Children* in the prosecution of all suits brought, or to be brought for recovery of partnership property; and contended that, under that power, *Burton* was authorized to sign the note in this case.

Platt, contra, contended, that although the deed empowered the remaining partners to use the retiring partner's name as a plaintiff in a suit, it did not authorize them to bind him by a promissory note or other negotiable instrument, and that, unless the instrument in question was obligatory on all the plaintiffs as a promissory note, the defendant was entitled to his discharge.

Per Curiam. This was using the retiring partner's name in the prosecution of a suit, and the note is obligatory upon him. The rule, therefore, must be discharged.

Rule discharged.

By a deed of dissolution of partnership, a power was reserved to the remaining partners, to use the name of the retiring partner in the prosecution of all suits. In an action in which judgment had been obtained by all the partners, before the dissolution, it was held, that the remaining partners had authority, under that power, to give to the defendant a note for the payment of the sixpences, under the *Lords' act*, on behalf of themselves and the retiring partner.

1821.

Thursday,
November 7th.

BLUNDELL *against* CATTERALL.

The public
have no com-
mon law right
of bathing in
the sea; and,
as incident
thereto, of
crossing the
sea shore on
foot, or with
bathing ma-
chines, for that
purpose.

TRESPASS, for breaking and entering the plaintiff's close, (describing it, first, as a close called the *Sea-Shore*, within the manor of *Great Crosby*; secondly, as a close between the high-water mark and the low-water mark of the river *Mersey*, in *Great Crosby*, in the county of *Lancaster*;) and with feet in walking, and with the feet of horses, and with the wheels of bathing machines, carts, and other carriages, passing over, tearing up, damaging the sand, gravel, and soil of the said close. The defendant pleaded, as to the trespasses committed on the close called the *Sea-Shore*, and on that between the high and low-water mark, a public right of way on foot, and with cattle, carts, and carriages; and secondly, as to the same trespasses, that all the liege subjects of our lord the king, had been used and accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy the right and liberty of bathing in the sea from time to time, being over and upon the whole or any part of, or adjoining to, the said close, in which, &c., at all seasonable and convenient times, for their health and recreation, and for that purpose, of going and returning, passing, and re-passing into, through, over, and along the said close, in which, &c. on foot, and with their servants, and with carriages and bathing machines, and horses drawing the same to the sea and back again; and of staying in and upon the close a necessary and convenient time for the purposes of bathing as aforesaid: And thirdly, as to

part

part of those trespasses, a right of bathing and of passing on foot only. The plaintiff took issue on these pleas; and also newly assigned that the defendant committed the trespasses on other occasions, and for other purposes than those in the pleas mentioned, and out of the highway in the first set of pleas mentioned. Issue theron. At the trial, at the last *Lancaster* assizes, before *Bayley* J., a verdict was found for the defendant on the first set of pleas; and for the plaintiff on the new assignment, and on all the other pleas, subject to the opinion of the Court on a special case. The plaintiff was the Lord of the manor of *Great Crosby*, which is bounded on the west by the river *Mersey*, an arm of the sea. As lord of the manor, he was the owner of the shore, and had the exclusive right of fishing thereon with stake nets. The defendant was the servant at an hotel, erected in 1815, upon land in *Great Crosby*, fronting the shore, and bounded by the high-water mark of the river *Mersey*, the proprietors of which kept bathing machines for the use of persons resorting thither, who were driven by the defendant, in machines, across the shore into the sea, for the purpose of bathing, and the defendant received a sum of money from the individuals so bathing, for the use of the machines, and for his service and assistance. No bathing machines were ever used upon the shore in *Great Crosby*, before the establishment of this hotel, but it had been the custom for the public to cross it on foot, for the purpose of bathing. There was a common highway for carriages along the shore, and it was proved, that various articles for market were occasionally carted across the shore, although the more common mode of conveyance for such things was by a canal, made about forty years ago. The defendant contended for a common law right

for

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BLUNDELL
against
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against
CATERBALL

for all the king's subjects to bathe on the sea-shore, and to pass over it for that purpose, on foot, and with horses and carriages. The case was argued in last *Easter* term,

Gregson, for the plaintiff, contended, that there was no common-law right to bathe, independently of usage in the particular place; first, from the silence of the authorities; secondly, because such a right was contrary to analogies; and, thirdly, because it was contrary to established and acknowledged rights. As to the first point, it is sufficient to refer to Lord *Hale*'s treatise *De Jure Maris* and *De Portibus Maris*, where, in chapters 5 and 6, he enumerates the different public and private rights applicable to the sea-shore, and creeks and arms of the sea, and does not include this right. As to the second, it is laid down in Lord *Hale*, *De Portibus Maris*, pp. 73 and 76, and in *Morgan*'s case, p. 51 of the same book, that the public have no right to unlade goods, or to moor or tow their vessels on the shore, without leave. The authority of *Bracton*, lib. i. c. 12. s. 6., cannot have much weight, for it is only copied from the civil law, and was overruled in *Ball v. Herbert*. (a) As to the third point, it is clear that such a right would interfere with the improvement of the shore by the lord; and that this right is in the lord appears from Sir *Henry Constable*'s case, 5 *Rep.* 107., *Hammond v. Digges*, *Dyer*, 326., *The Attorney-General v. Roll and Others*, cited *Hale*, p. 27., *Stockwell v. Terry*, 1 *Ves. sen.* 115., and *Warwick v. Collins*, 2 *M. & S.* 361. (b) So, all wharfs, quays, &c. erected on the shore, might be pulled down;

(a) 3 *T. R.* 261.(b) The references are to Lord *Hale*'s treatises, as published by Mr. *Hargrave* in his Law Tracts.
for

for no length of time can legalize a nuisance, which these would be, if this right existed, *Vaught v. Winch,* 2 Barn. & Ald. 662., *Rex v. Cross,* 3 Campb. 224.

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against
CATERALL

Jay, contra. The case of *Ball v. Herbert* is very distinguishable from the present. That case only applied to the banks of a navigable river, which stand obviously on a different foundation from the sea-shore. On the banks of the river, where the right of towing was claimed, no general right of highway was contended for; whereas, in the present case, the locus in quo is a public highway. The claim there made, if maintainable, would have established the right to tow on both sides of all navigable rivers, although this is contrary to general practice, and although most of the navigable rivers in the kingdom have been made so under different acts of parliament, passed subsequently to the lawful construction of dwelling-houses, &c. upon their banks. Whereas the barren sands of the sea-shore, covered by the sea every tide, are no where so appropriated. The fact, too, that such acts have been repeatedly passed to make rivers navigable, and to appoint towing-paths on their banks, within certain limits, shews that such paths did not previously exist at common law. An act of parliament was not considered necessary to render the open sea navigable, or its shores accessible. The distinction between navigable rivers and the sea-shore is frequently noticed by Lord *Hale*, pp. 6 and 7. This right is not contrary to analogies; for the public, generally speaking, have a right to fish on the coast, and on arms of the sea, and to cross its shores for that purpose, although that right may, in some few instances, have been interfered with, where individuals claim under a grant from the crown, or by prescription, which presupposes a grant.

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 against
 COTTERALL.

a grant. Lord *Hale*, pp. 11, 19, 20., and *Bagott v. Orr*. (a) The right to bathe in the sea is of great moment to the public, and less liable to private appropriation than the right of fishery. Although private individuals may possess advantages connected with the shore, still they cannot possess any which can authorize them to preclude the public from their permanent right of free passage over it. The erection of wears, although in some instances tolerated under ancient grants, has been repeatedly treated and considered by the law as a nuisance, on the ground that they interfere with the public rights of fishery. In *Weld v. Hornby* (b), the substitution of a stone wear for one of brush-wood, was held to be an illegal encroachment, because it prevented the ascent of fish up the river. In *Bagott v. Orr*, the right of the public to pass freely over the sea-shore for any common use and enjoyment thereof, is fully recognized. The authority of *Bracton* is expressly in point, and fully establishes the position, that the sea-shore is as common to all as the sea itself; and as the sea is open to every one, it follows, that if the passage from *Bracton* be good law, that the shore is equally so. His authority, indeed, was questioned in *Ball v. Herbert*. Lord *Hale*, however, in his History of the Common Law, mentions *Bracton* as a good authority. He was Chief Justice of *England* in the reign of *Hen. 8.*, and from his station, therefore, must be taken to be no mean authority of what the common law was in his day. The passage referred to, is cited by Lord *Hale* in his treatise, *De Portibus Maris*, c. 7., p. 83., and also in *Callis on Sewers*, p. 54. It is no objection to the passage, that *Bracton* has availed himself of the very

(a) 2 Bos. & Pull. 472.

(b) 2 East, 196.

words of *Justinian*. It was impossible, that he should not have found the principles there laid down in the civil law, or in any other well digested code, for they are directly derived from the law of nature, and are indispensable to the enjoyment of those common benefits which are most susceptible of private appropriation, and as such, are to be found in the written or unwritten law of all civilized nations, *Grotius De jure belli et pacis*, c. 2. ss. 3. & 4., and *Mare liberum, passim*. *Lord Hale* c. 6., p. 78., is an authority to shew a general right in the public to the free use of the shore for all lawful purposes. As to the third objection, that the right claimed in this case, is incompatible with acknowledged private rights, such as the erecting of wharfs, quays, and embankments, the right now claimed being the more ancient, the more general, and the more important of the two, is paramount. Besides this general freedom of passage over the shore is not incompatible with the occasional construction of quays or wharfs. They are rarely, in point of fact, so situated as to offer any real obstruction to persons crossing the shore for a lawful purpose, while they mainly contribute to another very material and equally lawful enjoyment of it, in the facilities afforded by them to the landing and loading of goods, and such buildings are allowed from the necessity of the case, and for the public good, and are in no instance so entirely juric privati as not to be subject to public regulation, being affected with a public interest. And if they should be so situated, as instead of conducting to the better use of the shore, to become actual obstructions thereto, they may be abated as nuisances, *Lord Hale*, c. 7. *de portibus maris*, p. 85. Besides any argument derived from the dif-

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ficulty of reconciling the erection of wharfs or embankments, with the general right to pass over the shore, for the purpose of bathing, must apply equally against the right to pass over it for the purpose of fishing, which latter is admitted to exist. It is clear, that the common law right to bathe exists, from the universal practice of the whole realm, which is a proof of what the common law is, the usage of a place being a custom, but that of the whole realm being the common law. The authority of *Bracton* is expressly in point, and establishes the position, that the sea-shore is as common to all as the sea itself. If so, then the absence of any authorities, shews that it remains the common law now; for it cannot be shewn to have been since altered. The right to the shore was originally in the king, and when in his hands, was subject to this right. No subject claiming under him, can claim a greater right than the king had. As to the right to bathe from machines, it exists as an accessory to the general right, for many persons, from infirmity or other circumstances, might otherwise be deprived of this beneficial practice.

Cur. adu. null.

And now, there being a difference of opinion, the Court delivered their judgments *seriatim*.

BEST J. The question in this case is, whether there be a common-law right to pass over the shore for the purpose of bathing in the sea. It will not be disputed that the sea, which has been called the "Great highway of the world," is common to all. Bathing in the sea, if done with decency, is not only lawful, but proper, and often necessary for many of the inhabitants of this country.

try. There must be the same right to cross the shore in order to bathe as for any other lawful purpose. We are, therefore, now to decide, whether the public are precluded from passing, except at particular places, over the beach to the sea without the consent of some lord of a manor. That this will be the consequence of our deciding in favour of the plaintiff, has been already admitted at the bar, and must be conceded by every one. I am fearful of the consequences of such a decision; and, much as I dislike differing from the rest of the Court, I have thought it my duty to declare that I cannot assent to it. We have been told that lords of manors will find it their interest to indulge the public with the privilege of going on or over the sands of the sea, and that judges and juries will check the vexatious exercise of the right to exclude them. But the free access to the sea is a privilege too important to Englishmen to be left dependant on the interest or caprice of any description of persons.

It is agreed by all, that the sea-shore was at first appropriated to the king, from whom the right to it must be derived. The present state of the shore shews the manner in which the crown must have used it. Some parts of it were held exclusively by the crown for the purposes of fisheries, harbours, warehouses, &c. But the greatest part was left open as a common highway between the sea and the land. This is the state in which it continues to this day, and in which, from its general sterility, it must ever continue. From the state of the greatest part has arisen the general rule, or common-law right, and the state of the portions exclusively occupied has occasioned the exceptions. The claim of the public to a right of way over the beach

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stands on the general law, and a person who will dispute this public right in any particular part of it, must establish his right to do so by shewing, first, that the king had an exclusive possession of such part, and that a right to such exclusive possession has been conveyed from the crown to such person. This has been the course in which persons have proceeded who have attempted to shew any exclusive right, either in arms of the sea or in the shore. In *Lord Fitzwalter's* case (*a*), Lord *Hale* says, “An arm of the sea is *primâ facie* common to all, and if any will appropriate a privilege to himself, the proof lieth on his side; for in case of an action of trespass brought for fishing there, it is *primâ facie* a good justification to say, that the *locus in quo* is *brachium maris, in quo unusquisque subjectus dom. regis habet et habere debet liberam piscariam.*” So, in *Bagott v. Orr* (*b*), the Court of Common Pleas held, “that if the plaintiff had it in his power to abridge the common-law right of the subject to take sea-fish upon the shore within his manor, he should have replied that matter specially.” The same doctrine is laid down in *Carter v. Murcot*. (*c*) It may be observed, that in the case now under consideration it is expressly found, that the soil of the *locus in quo* is in the plaintiff; but I say the soil must be in the plaintiff, as it was in the king; for the grantee cannot have a greater interest than the grantor had. The king had the right of soil in the shore in general; but the public had a right of way over it, and the king's grantee can only have it, subject to the same right. In the treatise of *De Jure Maris*, p. 22.,

(*a*) 1 Mod. 105.(*b*) 2 Bos. & Pull. 479.(*c*) 4 Burr. 2162.

Lord

Lord *Hale* says, “ The jus privatum that is acquired to the subject, either by patent or prescription, must not prejudice the jus publicum wherewith public rivers and arms of the sea are affected for public use.” If the owners of the soil must claim by prescription, can they establish an exclusive right? Did they ever possess an exclusive right? For, as Lord *Hale* says, the civilians tell us truly, “ Nihil præscribitur nisi quod possidetur. (a) As the king might have granted a right in particular parts of the shore, so, either he or his grantee of the soil of any part of the shore, may take the products of the shore, provided their removal does not impede the public right of way. The owner of the soil of the shore may also erect such buildings or other things as are necessary for the carrying on of commerce and navigation on any parts of the shore that may be conveniently used for such erections, taking care to impede, as little as possible, the public right of way. This is not more inconsistent with a public right of way over it, than the right of digging a mine under a road, or the erecting of a wharf on a river, are inconsistent with the right of way along such road or river. The former does not interfere with the use of the road; and although the latter, in order to be useful, must be carried out beyond the high-water mark, and, whilst the tide is up, must somewhat narrow the passage of the river; yet, such wharfs are necessary for the loading and unloading of vessels, and the right of passage must be accommodated to the right of loading and unloading the craft that pass. The law in these, as in all other cases, limits and balances opposing rights; that they

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(a) *De jure maris*, p. 52.

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may be so enjoyed as that the exercise of one is not injurious to the other. The civil law, copying, in this respect, from the law of nations, allowed any one to build on the sea-shore (there being, under that law, no lords of manors to claim the soil), but imposed on the builders the condition that the law of *England* imposes on the owners of the soil, that is, that their buildings should not interrupt the right of way. *Digest*, l. 43. tit. 8. "In littore jure gentium ædificare licet nisi usus publicus impedit."

The universal practice of *England* shews the right of way over the sea-shore to be a common-law right. All sorts of persons who resort to the sea, either for business or pleasure, have always been accustomed to pass over the unoccupied parts of the shore with such carriages as were suitable to their respective purposes, and no lord of a manor has ever attempted to interrupt such persons. Goods could not be landed or loaded except at particular places, but this restraint was imposed by laws made for the protection of the revenue, and the security of the realm, and is not the consequence of any rights in the owners of the soil of the shore. Men have landed from boats, drawn their boats on the sands during their stay on shore, and embarked again in their boats. Persons have at all times, at their pleasure, walked or ridden on the sands. Men have, from the earliest times, bathed in the sea; and, unless in places or at seasons when they could not, consistently with decency, be permitted to be naked, no one ever attempted to prevent them. So far from the law allowing lords of manors to restrain persons from bathing, it will give them every facility for this recreation. Bathing promotes health. By bathing, those who live near the sea are taught their first duty, namely,

namely, to assist mariners in distress. They acquire, by bathing, confidence amidst the waves, and learn how to seize the proper moment for giving their assistance. It is found as a fact, in this case, that it has been the custom for the public to cross the spot in question on foot for the purpose of bathing. Bathing machines were used before my time, and I believe before that of the oldest person now alive, and I think the use of them is essential to the practice of bathing. Decency must prevent all females, and infirmity many men, from bathing, except from a machine. Attempts have been made to make those who use machines pay some acknowledgment to the lord of the manor where they were used; but I cannot find that any of those attempts have yet succeeded. I shall presently shew from authority, that the right to fish is only a part of the general right of the subjects of *England*. Persons have also crossed the beach for the purpose of fishing in the sea, and have brought back their fish over the beach, both on horses and in carriages. These acts of the fishermen are instances in support of the common-law right of way.

The practice of a particular place is called a custom. A general immemorial practice through the realm is the common law. Many of our most valuable common law rights have no other support than universal practice. In *Ball v. Herbert* (^a), Lord Kenyon says, "Common law rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the universal and immemorial usage throughout the country." The instances put by me, sufficiently demonstrate

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against
CATTERALL(^a) 3 T. R. 261.

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against
Carrington.

the existence of an universal custom in favour of a public right of way over the sea shore.

It has been at all times the policy of this country to encourage navigation. The free passage of the sea shore is essential to the convenience and safety of navigation. Cases of immediate necessity or imminent danger may be said to form exceptions to general rules; but there are many cases in which there is neither immediate necessity nor imminent danger, in which boats must pass between ships at sea and the shore, letters and provisions must be sent, passengers require to land or to embark, intelligence necessary to the further prosecution of a voyage is desired, or a pilot is wanted. For many leagues of coast, there is no public passage marked out, by which persons may go to or from the sea. But fixed places will not do. Winds or currents make it necessary, that the greatest part of the shore should be left open for persons to land on, and embark from. There is no statute, or rule of common law, that secures the right of passage over the shore for purposes connected with navigation; those who have passed over the shore for those purposes, have been trespassers, if they were not justified under the general common law right of free passage. Is it to be supposed, that, in a country, the prosperity and independence of which depends on navigation, that which is so necessary to navigation as a road for all lawful purposes to the sea, should not have been secured to the public, particularly when it might be done without injury to the interest of any individual?

There is no clear and express declaration on this point, either in the statutes or in the common law. But this right is so important to the best interests of the country, that had not the constant exercise of it

been

been considered sufficient to establish it, the legislature would no doubt have declared it to be in the people of *England*. *Bracton*, lib. 1. cap. 12. sec. 6., says, “*Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuivis liberum est, sicut per ipsum fluvium navigare: sed proprietas earum illorum est quorum prediis adherent, et eadem de causâ arbores in eisdem natâe eorundem sunt: et hæc intelligenda sunt de fluminibus perennibus, quiâ temporalia possunt, esse privata.*” This passage proves all that I am attempting to establish. It shews that all persons have a common right on rivers; that the right of fishing exists only as a part of that common right, and that the banks of rivers are as much open to the use of the public as the rivers themselves. The passage has been supposed to prove too much, and therefore it has been said, that its authority cannot be relied on. Mr. Justice *Buller*, speaking of it, in *Ball v. Herbert* (*a*), says, “that it plainly appears to have been taken from *Justinian*, and is only part of the civil law; and whether or not it has been adopted by the common law, is to be seen by looking into our books; and there it is not to be found.” I admit that *Bracton* agrees with the civil law, and I must add, with the law of all civilized nations. *Selden*, who wrote his “*Mare clausum*,” to prove that an exclusive right might be acquired in parts of the sea, admits that the sea was originally common to all, and

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in lib. 1. cap. 2., he has collected from the works of the learned of all nations, as well philosophers, divines, and poets, as lawyers, that the sea and its shores were common to all men, as much so as the air that blows over them. This I think proves, that the doctrine is reasonable, and ought to be adopted into our law, unless there be something in our particular situation to exclude it; and so far from this being the case, there never was a country, the local situation of which, and the habits and interests of the inhabitants of which, so much required such a law.

But our books shew, that this passage has been adopted into our law. Mr. Justice *Buller* tells us, that *Collis* quotes it as *English* law, and I have often heard Lord *Kenyon* speak with great respect of that writer. *Bracton* has not stated this as civil law, he has made it part of his book, *De legibus et consuetudinibus Anglie*. He was Chief Justice of *England* in the reign of *Henry the Third*; and Lord *Hale* (*Hist. of the Common Law*, ch. 7,) says, that in his time the common law was much improved, and the pleadings were more perfect and orderly than in any preceding period of our history. Surely such a man is no mean authority for what the common law was at the time he wrote. In *Fortescue*, p. 408., Lord Chief Justice *Parker* says, "As to the authority of *Bracton*, to be sure many things are now altered; but there is no colour to say, that it was not law at that time, for there are many things that have never been altered, and are law now." As law is a just rule fitted to the existing state of things, it must alter as the state of things to which it relates alters. I do not say, that the whole of the passage in *Bracton* is now good law: it was all good law at the time he wrote, and

and all of it that is adapted to the present state of things is good law now. It is objected, that *Bracton* says, "that any one may, in any river, fasten vessels with ropes to the trees on the banks, and unload the cargoes on the banks." Undoubtedly the public cannot now pretend to claim this right in all navigable rivers. Many rivers have been rendered navigable since *Bracton* wrote, which in his time were private streams. The public have no greater right on the banks of such rivers, than the owners of the adjoining lands granted them when such rivers were made, from private streams, public rivers, and the extent of the grant must be ascertained from usage. This is the case with a new made road. If one dedicates to the public a right of way over his lands, the public must take the road with gates on such parts of it as the owner thinks proper to erect at the time he makes the dedication. But *Bracton* speaks not of newly made rivers, but of such as were always navigable, and the banks of which had been as open to the public as their waters. This I take to be the law with all inland navigations in the reign of *Henry the Third*. These, like the sea and its shores, were then the property of the public, and the right of the public in them was not acquired by any compromise with the interest of any individual. On some rivers that have been navigable from time immemorial, the public using but one of the banks for a towing path, the other has been usefully occupied by the owner of the adjoining land, and so an exclusive right has been established to the part so occupied. But the barrenness of the greatest part of the sea shore has prevented it from becoming the subject of exclusive property. It is useful only as a boundary and an approach to the sea; and therefore,

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ever has been, and ever should continue common to all who have occasion to resort to the sea. Thus, the case of *Bail v. Herbert* is distinguished from the present, and it must be recollectcd, that, in that case, Lord *Kenyon* said, "Some of the passages in Lord *Hale* which seem to favour the common law right, are rather applicable to banks of the sea, and to ports; and it is part of the king's prerogative to create ports, which was lately exercised at *Liverpool*." In *Broke's Abridgement*, tit. *Customs*, pl. 46., all the Judges agreed, "that fishermen may justify going on the land adjoining the sea, to fish in the sea; for this is for the good of the commonwealth, affording sustenance to many persons, and is the common law." If the right of fishing is only a part of that more general right for which I am contending, as appears from the passage in *Bracton*, and will appear from Lord *Hale*, then this is a decision in support of the general right.

The reason on which my judgment is grounded is public advantage. The right of bathing in the sea, which is essential to the health of so many persons, is as beneficial to the public as that of fishing, and must have been as well secured to the subjects of this country by the common law. That the right of using the shore for the purpose of fishing does not depend on any particular law applicable to fishing only, but is part of the more general right of the subjects to the sea and its shores, is proved by Lord *Hale*, putting the practice of fishing as evidence of the general right. In part 1. cap. 8. *de jure maris*, p. 11., he says, "The king's right of propriety, or ownership, in the sea, and soil thereof, is evidenced principally in these things that follow; first, the right of fishing in the sea, and the creeks."

creeks and arms thereof, is originally lodged in the crown." This makes the judgment in *Broke* bear directly on the point in dispute. Lord *Hale*, in his treatise *De Portibus Maris* (cap. 6. p. 73.), says, "Before any port is legally settled, although the propriety of the soil of a creek or harbour may belong to a subject or private person, yet the king hath his *jus regium* in that creek or harbour; and there is also a common liberty for any to come thither with boats and vessels, as against all but the king. And, upon this account, though *A.* may have the propriety of a creek or harbour, or navigable river, yet the king may grant there the liberty of a port to *B.*; and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to *A.*; for he hath what he had before, viz. the interest of the soil, and consequently the improvement of the shore, and the liberty of fishing; and as the creek was free for any to pass in it, against all but the king, (for it was *publici juris*, as to that matter, before), so now the king takes off that restraint, and by his licence and charter makes it free for all to come and unload." Here, we have the distinct authority of Lord *Hale*, that although a man has the soil under an arm of the sea, and the soil of the shore, yet the public have not only a right to navigate on the waters, but to *unload* on the shore; and that this right can only be restrained by the king's prerogative. If they have a right to unload, they must have the right to come over the shore; for the right to unload would otherwise be useless. The right on the shore is declared by this passage to be as common to the public as the right on the water: that the water is open to the public for all lawful purposes is not denied.

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What law, then, has narrowed the right of the public on the shore? Lord *Hale* then adds, “ But if *A.* hath the ripa or bank of the port, the king may not grant a liberty to unlade on that bank or ripa without his consent, unless custom hath made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the private interest of *A.*, which may not be taken from him without such consent. And, therefore, in the creation of a new port, either by proclamation or charter, it hath been the course to secure the interest in the shore beforehand, for the building of wharfs and keys, for the application of the merchandize, and for the building of houses of receipt.” Lord *Hale* makes the distinction between the shore of the sea and the banks of a river, which Lord *Kenyon* points at in *Ball v. Herbert*; the former is free for all to come and unload, but the king cannot grant a liberty to unload in the latter, without the consent of the owner. I again repeat, that the shore is not free to unload from any particular law giving this freedom, but from the general right of passage over it, which the usage of the whole coast shews to have been reserved for the benefit of the public out of the grant of the soil by the crown. This is further proved to be the meaning of Lord *Hale* by the concluding words of this passage, in which he says it was usual to secure the interest of the shore, not for a way to the sea, but for the building wharfs, quays, and houses for the reception of goods. The right of way the public had, but the right of building was to be purchased. The cases of *Young v. ——— (a)*, and *The Queen v. The Inhabitants of Cloworth (b)*, are pro-

(a) *Ld. Raym.* 725.(b) *6 Mod.* 163.

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perly over-ruled by that of *Ball v. Herbert*; and I do not rely on those cases.

My opinion is founded on these grounds. The shore of the sea is admitted to have been at one time the property of the king. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the king, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shews that the public right has been excepted out of the grant of the soil. Our law books furnish us with little for our guidance on this subject; what is to be found seems to favour the common law right of way. But unless I felt myself bound by an authority as strong and clear as an act of parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance. In the first ages of all countries, not only the sea and its shores, but all perennial rivers, were left open to public use. In all countries, it has been matter of just complaint, that individuals have encroached on the rights of the people. In *England*, our ancestors put the public rights in rivers under the safeguard of magna charta. The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours. It has been said, that lords of manors should have a right to prevent bathing, that they might hinder persons from doing it in places of public resort. Magistrates are

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armed with authority to bring to punishment such as bathe indecently. I would rather rely on disinterested and responsible magistrates, than on an interested and irresponsible lord of a manor. A lord of a manor might remove bathers from a part within view of his own house, but would he be equally active to protect his neighbours from offence? If he is not, I know no mode of forcing him to execute the power he derives from his property. For these reasons, I am of opinion that the defendant is entitled to the judgment of the Court.

HOLROYD J. The question put in this case for our opinion, is the general question, whether there is a common-law right for all the king's subjects to bathe in the sea, and to pass over the sea-shore for that purpose, on foot and with horses and carriages. But, coupled with the facts stated in the case, the question really is, whether there is a common-law right in all the king's subjects to do so in the locus in quo, though the soil of the sea-shore, and an exclusive right of fishing there in a particular manner (namely, with stake nets), are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial. The plaintiff being stated to be the owner of the soil of the shore, and to have the exclusive right of fishing thereon, with stake nets, as lord of the manor, the soil, as parcel of or belonging to the manor, must, according to *2 Bl. Com. 92.*, have been so from before the time of passing the statute, *Quia Emptores Terrarum, tempore Edw. 1.*, since which time no manor can have been created; and the plaintiff being stated to have the exclusive right of fishing, as lord of the manor, this can only be as appendant or appurtenant to the manor. It must,

must, therefore, be by prescription, and consequently there has been an exclusive right of fishing there from time immemorial. The question, too, is, as to the public right to the extent above stated, independently of usage and custom. The right is claimed on the pleadings, as founded not on usage or custom, but upon the supposed general law only; and the usage, as stated in the special case, is found to have been for the public to cross the sea-shore on foot only, for the purpose of bathing, no bathing machines having ever been used in *Great Crosby*, where the locus in quo is situate, before the establishment of the present hotel. My opinion, therefore, on this case, will not affect any right that has been or can be gained by prescription or custom, either by individuals or by either the permanent or temporary inhabitants of any vill, parish, or district.

The claim upon the pleadings, respecting the public highway along the shore, and the verdict, and facts found in the special case respecting the same, make no difference, but leave the question, with respect to the right of bathing, and the right incident thereto (if any) of passing over the sea-shore for that purpose, on foot and with horses and carriages, the same as if no such claim of a general public highway existed, or was put upon the record, as the jury have found a verdict for the plaintiff upon the new assignment, that the trespasses complained of were committed in the locus in quo on other occasions, and for other purposes than as a general public highway and out of the highway there.

It was contended in argument at the bar, that, by the common law of *England*, all the king's subjects had a right, not only to traverse the ocean itself in every di-

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tection, as well for commerce, trade, and intercourse, as for every other lawful purpose; but, also, that they had a general public right of way over the sea-shore to and from the sea, and that they had it, as well during the recess as during the flux of the tide, for all lawful purposes; and that the king could not grant the shore so as to supersede or to deprive the public of the exercise of that right over the sea-shore. And it was further contended, that even if the public right was not so extensive, yet that, at all events, the king's subjects had a right of bathing on the sea-shore, so that it be exercised in such a way as is conformable to decency; and that they had also, as incident thereto, a right to pass over the sea-shore, not merely on foot, but with horses and carriages; that is to say, with bathing-machines for that purpose, whether the sea-shore belonged to the king as public property, or to any individual as being now or even immemorially private property; and that such public right could not be superseded by the king's grant of the sea-shore as private property. And the earliest authority cited for this purpose was from *Brockton*, who copied it from the civil law. But whatever may be found to be the civil law upon this subject, and whatever may have been stated by some of our law writers from the civil law, or may be found to have dropped as dicta from some of our judges; yet it appears, I think, that the civil law, as applicable to this subject, differs from the common law of *England*; that its principles have not only not been adopted into the common law, but are at variance with it, and are therefore no guide to us; that the public right, to the extent claimed in this case, is not only not found to be established by our law, but that the established principles

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of our law are inconsistent with it. The question is with regard to the shore; that is to say, the land between the high and the low water-mark, and, according to Lord *Holt's* definition of the sea-shore, between those marks at ordinary tides, that is to say, between the ordinary flux and reflux of the sea.

In *Bracton*, l. 1. c. 12. s. 6., it is thus laid down: "Publica vero sunt omnia flumina et portus, ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natu religare, onus aliquod in iis reponere, cuivis liberum est, sicut per ipsum fluvium navigare; sed proprietas earum, illorum est, quorum praedilis adhaerent et eadem de causa arbores in eisdem natu eorundem sunt. Sed haec intelligenda sunt, de fluminibus permanentibus; quia temporalia possunt esse privata." This passage is quite general, and is not confined to tide or navigable rivers. The doctrine as to the banks of rivers, is contrary to the case of *Ball v. Herbert* (*a*) respecting the right of towing paths, where Lord *Kenyon* says, "That there is such a custom on most of the navigable rivers, no person doubts, but still the right was founded solely on the custom." And there the Court determined against the general common law right claimed. It is, indeed, supported by the dicta of Lord *Holt*, in *Young v. ——* (*b*), and *Rex v. Chaworth* (*c*), in the former of which cases he ruled, "that every man, of common right, may justify the going of his servants or his horses upon the banks of navigable

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(*a*) 3 J. R. 261.(*b*) 3 T. R. 261.(*c*) 1 Ld. Raym. 725. 6 Mod. 163.

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rivers, for towing barges, to whomsoever the right of the soil belongs;" and in the latter, " that if one has land adjoining on a common river, every one that uses that river, has, if occasion be, a right to a way by brink of water over that land, or further in if necessary." But both these authorities were cited and commented on in the case of *Ball v. Herbert*, and expressly overruled by the Court. The passage in *Bracton* is taken from *Justinian, Inst. lib. 2. tit. 1. ss. 2. and 4.*, and is in his very words, except with the addition of the last sentence. But besides the difference between our law and the civil law, in regard to what is even there laid down by *Bracton*, the variance between the common law and the civil law in other respects, as to marine properties and rights, shews, that the civil law cannot be any guide, or afford any illustration to us in these matters; and therefore, though *Justinian* in s. 1. of that book and title, says, " Nemo igitur ad littus maris accedere prohibetur;" yet his doctrine cannot have any weight or authority in that respect with us, unless it be found to be confirmed or adopted by our own lawyers, and particularly, if it be found not to be consistent with, and conformable to the doctrines and principles of the common law. That there is this great difference between the civil and the common law, will appear from stating what is laid down in *Justinian*, in some of the other sections of that book and title, and comparing it with what is undoubtedly the common law, as to that species of property. In *Justinian*, the shore is thus defined, " Est autem littus maris quatenus hybernius fluctus maximus excurrit." By the common law, we know it is confined to the flux and reflux of the sea at ordinary tides. In *Justinian*, this

this is laid down, *De usu et proprietate littorum*, s. 5. “*Littorum quoque usus publicus est et juris gentium, sicut et ipsius maris; et ob id cuilibet liberum est casam ibi ponere in quam se recipiat, sicut retia siccare, et ex mari deducere: Proprietas autem eorum potest intelligi nullius esse, sed ejusdem juris esse, cuius et mare, et quæ subjacet mari terra vel arena.*” By the common law, no such right exists in the public of erecting on the sea-shore any building for drying their nets; and instead of the property in the shore being in no one, it is *prima facie* in the king, and may be in a subject; and so may even an arm of the sea, a *districtus maris*, as *Hale De jure maris*, p. 31., says, “a place in the sea between such points, or a particular part contiguous to the shore, or a port, or creek, or arm of the sea;” though, as he also there lays it down, in the main sea itself, adjacent to his dominions, the king only hath the property, but a subject hath not, and indeed cannot have that property in the sea through the whole tract of it, that the king hath, because, without a regular power, he cannot possibly possess it. So by the civil law, s. 18., “*Lapilli et gemmæ et cetera quæ in littore maris inveniuntur jure naturali statim inventoris fiunt.*” By our law, we know that wrecks and things found upon the sea-shore do not belong to the finder, but, where the owner cannot be discovered, to the king or his grantee, or to some person by prescription which presupposes such grant. So by the civil law, s. 22., “*Insula quæ in mari est, quod raro accidit, (here he is speaking of an island newly rising from the sea,) occupantis fit; nullius enim esse creditur.*” Lord *Hale*, *De Jure Maris*, p. 36., shews how the common law differs from this, “As touching islands arising in the sea, or

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in the arms, or creeks, or havens thereof, the same rule holds which is before observed, touching acquests, by the reliction or recess of the sea, or such arms, or creeks thereof. Of common right and *prima facie*, it is true, they belong to the crown; but where the interest of such *districtus maris*, or arm of the sea, or creek, or haven, doth, in point of property, belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private property of a subject, will belong to the subject, according to the limits and extents of such property."

By the common law, all the king's subjects have in general a right of passage over the sea with their ships, boats, and other vessels, for the purposes of navigation, commerce, trade, and intercourse, and also in navigable rivers; and they have also, *prima facie*, a common of fishery there; but they may be excluded from the latter right, though not now by charter, at least by immemorial custom or prescription. These rights are noticed by Lord *Hale*; but whatever further rights, if any, they may have in the sea, or in navigable rivers, it is a very different question whether they have, or how far they have, independently of necessity or usage, public rights upon the shore, (that is to say, between the high and low water-mark), when it is not sea, or covered with water, and especially when it has from time immemorial been, or has since become private property. For the purpose of the king's subjects getting upon the sea, and upon the navigable rivers, to exercise their unquestionable rights of commerce, intercourse, and fishing, there are not only the ports of the kingdom, established from time to time by the king's prerogative, and called by Lord *Hale* the *Ostia Regni*; but

but also public places for embarking and landing themselves and their goods. It was not by the common law, nor is it by statute, lawful to come with or land or ship customable goods in creeks or havens, or other places out of the ports, unless in cases of danger or necessity, nor fish or land other goods not customable, where the shore or the land adjoining is private property, unless upon the person's own soil, or with the leave of the owner thereof, who, Lord *Hale* says, may, in such case, take amends for the trespass in unloading upon his ground, though he may not take it as a certain common toll; because, for so doing, it appears in Lord *Hale's* Treatise De Portibus Maris, p. 51., that one *Morgan* was fined 100 marks. No such amends could be taken, if there was a public right of coming there for that purpose in particular, or for purposes in general, In a case of necessity (as Lord *Hale*, in his Treatise De Portibus Maris, p. 58., says) either of stress of weather, assault, or pirates, or want of provisions, any ship might put into any creek or haven. And he then further says, "In case of necessity, and for the supply of fishermen, all places were to that purpose and end ports;" that is, for the purpose of finding provisions for ships and mariners. This is not consistent with the general right contended for, as being in the public, of coming on the shore for their purposes in general as and when they please. It is said, indeed, in *Fitzh. Barre*, 93., which cites 8 Ed. 4. 19., "Note by *Danby* (a), That the fishers who fish in the sea may justify their going upon the land adjoining to the sea, because such fishery is for the common wealth, and for

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the sustenance of all the kingdom; wherefore this is the common law, which was granted, &c." But in *Bro. Abr.*, Customs, 46., the same case is more fully stated, where the doctrine appears to have been laid down on a question which arose upon a custom. That was trespass for digging land; and the defendant pleaded, that it was four acres adjoining to the sea, and that all the men of *Kent*, from time immemorial, have used, when they have fished in the sea, to dig in the land adjoining and pitch stakes for hanging their nets to dry. *Nele.* (a) He ought to shew what men. *Choke* (b) and *Littleton*, (c) This is not the custom, for it is against common right and reason. *Danby.* (d) Fishers may justify going upon the land to fish, for this is commonwealth, and for the sustenance of man, and is the common law, which was granted. *Fairfax.* (e) " Digging is destruction of the inheritance, therefore it is not a custom, &c." But this appears more fully still by recurring to the Year-book itself, and Lord *Hale*, De Portibus Maris, 86., treats it as arising upon a custom; for he there says, " Look at the book of 8 Ed. 4. 18. for the Custom of *Kent*, for fishermen to dry their nets upon the land, though it be the soil of private men." The case, as stated in the Year-books, 8 Ed. 4. 18, 19., after stating the pleadings as in *Broke*, proceeds as follows: *Nele.* He hath said that the men have used, &c., and this is not a good prescription, being, he ought to shew who, &c. *Choke.* This custom cannot be good; for it is against common right to prescribe to dig in my land; but there

- (a) Counsel.
(c) J. of C. P.
(e) Counsel.

- (b) C. J. of C. P.
(d) J. of C. P.

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are other customs, which are used throughout the whole land, and such customs are lawful; as of innkeepers, &c. and also a neighbour negligently keeping his fire, &c., and such customs are good, &c. *Littleton.* A custom which runs through the whole land is the common law, as the cases that you have put are, &c.; and, Sir, such custom, which may stand with reason, shall be suffered, as in the case where the younger son ought to inherit; for there is a reason for this, &c. But this custom is against reason; for if he may dig in one place, he may dig in another place; and so, if a man hath a meadow adjoining the sea, they may, by such custom, destroy all the meadow, which would not be reasonable. *Danby.* Those who are fishers in the sea may justify their going on the land adjoining to the sea; for such fishery is for the commonwealth, and for the sustenance of all the realm, &c.; wherefore this is common law, quod fuit concessum. (This, it may be observed, as far as it extends to the land above high water-mark, is contrary to *Ball v. Herbert*, unless where it is founded on custom. Such a custom may be good where a right to dig is not claimed, or the doing so may be justified under such circumstances as I shall afterwards state from *Lord Hale*). *Choke.* If I have land adjoining to the sea, so that the sea ebbs and flows on my land, when it flows, every one may fish in the water which has flowed on my land, for then it is parcel of the sea, and in the sea every one may fish of common right, &c.; and, Sir, when the sea is ebbed, then in this land, which was flowed before, peradventure he may justify his digging, &c.; for this land is of no great profit to me, &c." It, therefore, clearly appears that this case proceeded entirely upon a particular custom, and the

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doctrine laid down by *Choke*, C. J. may be true, where there is such a custom; and such custom, confined to the sea-shore, may perhaps be good; but, if founded solely on the common law, is inconsistent with many passages in Lord *Hale*. By the common law, though the shore, that is to say the soil betwixt the ordinary flux and reflux of the tide, as well as the sea itself, belongs to the king; yet it is true that the same are also *prima facie publici juris*, or clothed with a public interest. But this *jus publicum* appears from Lord *Hale* to be the public right in all the king's subjects, of navigation for the purposes of commerce, trade, and intercourse; and also the liberty of fishing in the sea or the creeks or arms thereof, which Lord *Hale*, *De Jure Maris*, p. 11., says, the common people of *England* have regularly, as a public common of piscary, and which, he says, they may not, without injury to their right, be restrained of, unless in such places, creeks, or navigable rivers where either the king or some particular subject has granted a propriety, exclusive of that common liberty. Neither in Lord *Hale's* treatise, nor elsewhere, does it appear that there is a common law right in the king's subjects in general, or any of them, to appropriate the sea-shore, or the soil even below the low water-mark, for general purposes, though temporary only, to their own use, without the king's grant or licence, even where that can be done without nuisance to his subjects. Such an appropriation by any of the king's subjects, without his grant or licence, though it were not in law a nuisance, would be (see Lord *Hale*, *De Portibus Maris*, 85.), where the soil remains the king's, a purpresture, an encroachment, and intrusion upon the king's soil, which he may either demolish or seize,

seize, or arent, at his pleasure; and though it were even by building below the low water-mark, it would not, as Lord *Hale* there says, be ipso facto a common nuisance, unless it be a damage to the port or navigation; but where it is a common nuisance, as he also there says, even the king himself cannot licence it. This shews that by the common law the king's subjects have not a general right of using or appropriating the soil of the sea-shore, or of the sea itself, as they please, even where the soil remains the king's, clothed with the *jus publicum*, and where that use or appropriation is effected in such a manner as not to be a nuisance to the public right of others.

But, further, such a general public right in all the king's subjects, to use the sea shore for all such temporary purposes as they please, would be, I think, inconsistent with the nature of permanent private property, or with the sea shore becoming such permanent private property. If, therefore, the right of bathing, and the right of passing over the sea shore on foot and with carriages, claimed as incident thereto, be claimed under the supposed general right of the public to use the sea, and the shore, for all such temporary legal purposes as they may please, such a public right of general appropriation is inconsistent with the fact of the locus in quo being private property, and of the fishing therein being also a private exclusive right, as stated in the case. And if the right of bathing, and of the incident foot and carriage way claimed for that purpose, cannot be established under such a general claim of right as I have before stated, it can only be supported under the specific claim of a public right of bathing, and of a carriage way, as incident thereto; for

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to that extent it must be established, in order to entitle the defendant to the judgment of the Court. And then, I ask, where is such a right of bathing on the sea shore, where it has become private property, and may immemorially have been so, and of a carriage way for that purpose as incident thereto, when sought for, to be found as existing at the common law, independently of usage and custom; a right too which is here claimed beyond the extent of the usage actually found in the case? Where the soil remains the king's, and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, it is not to be supposed that an unnecessary and injurious restraint upon the subjects would, in that respect, be enforced by the king, the *parens patriæ*. Where there is, and has hitherto been, a necessity, or even urgency, for such a right, it must, or most probably will have, usage and custom in the place to support, regulate, limit, and modify it; for, whenever there has been a necessity for it, there, as far as such necessity has existed, some usage must have prevailed.

In *Ball v. Herbert*, (a) Lord Kenyon, in speaking of common law rights, says, "Common law rights are either to be found in the opinions of lawyers delivered as axioms, or to be collected from the universal and immemorial usage throughout the country." And *Ashurst* J. says, "It seems extraordinary (if there be any such right) that it is not defined with greater certainty in any of our law books; for it is a right that in its nature must, if it existed, be subject to some restrictions, as, that it should be exercised only on one, and that the

(a) *S. T. R.* 261.

most

most convenient side of the river ; for it would, in many instances, be a very oppressive right, if it could be claimed on both sides." And *Buller J.* says, "This being claimed as a common law right, it can only be proved to exist by one of the means mentioned by my Lord, as to general usage throughout the kingdom, of which the Court is obliged to take notice : That clearly does not exist. Then the question is, whether in our books, or on records, that right is established for which the defendant contends. The case in *Lord Raymond* is a very loose and inaccurate note. Another authority cited is a passage in *Bracton*, and quoted by *Callis*: that plainly appears to have been taken from *Justinian*, and is only part of the civil law ; and whether or not that has been adopted by the common law, is to be seen by looking into our books, and there if is not to be found." The present claim, to the extent to which it is necessary to establish it on the part of the defendant, is not, therefore, as it appears to me, supported either by necessity, by general usage of the realm, which forms the common law, or by special usage in the particular place ; nor is it to be found in our law books ; nor, if it were, would it follow that it was such a common law right as might not, by prescription at least, be otherwise appropriated. That general common law rights are frequently so appropriated, we all know to be the fact ; and that this may lawfully be established, by prescription at least, will appear from authority. The public common law rights, too, with respect to the sea, &c. independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the sea shore, when covered with water; and though, as incident thereto, the public must have the means of getting to and upon

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the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the sea shore, or the land adjoining thereto, except in case of peril or necessity. In *Carter v. Murcott*, 4 *Burr. 2162.*, Yates J. (speaking of a prescription for a several fishery, claimed in a navigable river), says, "Such a right may be proved. By the law of *England*, what is otherwise common may, by prescription, be appropriated. *Grotius* owns that navigable rivers may be appropriated. The case of *The Royal Salmon Fishery in the River Banne*, in *Sir John Davis' Reports*, is agreeable to this; and it is a very good case."

Many passages in Lord *Hale's Treatises* are inconsistent with the existence of such a general right of bathing, and of a passage over the shore with carriages, at common law, as is here claimed, and shew that whatever the general public rights are, that they are only such as are upon and in the water, and not upon the dry land, unless in places sanctioned by usage, whether they be parts of the shore or not; at least, that they exist not upon the land, when not covered with water, where it has become private property, and, more especially, where it has immemorially been private or special property. I shall state a few of those passages. It appears from Lord *Hale*, that the king may license the erecting of quays, or other buildings, on the sea coasts, even below the low-water mark, where they are not in fact annoyances or nuisances, *Hale, De Portibus Maris*, 85.; so wears, *Hale*, 22., *De Jure Maris*. As to the making of ports, and the three-fold right therein, especially

cially the right of an individual subject, by charter or prescription, in a port, and previously in a creek or haven, particularly in bringing in his own goods, where he is owner of the soil, *Hale*, 72, 73. As to the owner's right to improve the shore, it is laid down that the king cannot grant a right to lade or unlade on the ripa or bank, without the owner's consent; there cannot therefore be any common law right to lade or unlade on the quay or shore, or land adjacent in the port, *Hale*, 51, 76. Evidence to prove the shore parcel of a manor, &c. disproves the general right of all the king's subjects on the shore, at least when and where it is not covered with water. So, as to having the right of royal fish and wreck, it is a great presumption that the shore is part of the manor, or otherwise he could not have them, *Hale*, 26, 27. Now, this would not be the case, if the king's subjects had a prior general right to come when they pleased upon the shore. These passages from Lord *Hale* appear to me to be inconsistent with the general right contended for, independently of custom, for all the king's subjects to come as and when they please upon the shore, particularly where it has been either from time immemorial, or where it has since become private or special property, especially where it is not covered with the tide or water. Lord *Hale* notices and establishes the public right of navigating and fishing upon and in the water, and the right of resort to the ports, and of lading and unlading, landing and embarking therein, either at the public places appointed or by usage established for those purposes, or with consent, upon the land, either of the king or of individuals, but no further. This right of bathing, and of a carriage way, as incident thereto, is

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no where noticed; and it does not, I think, exist by the common law upon the locus in quo, the private property of the plaintiff, unsupported as it is by usage and custom. I am, therefore, of opinion, in this case, that the plaintiff is entitled to the judgment of the Court.

BAYLEY J. The question in this case is, whether there is a common law right for all the king's subjects to bathe upon the sea-shore, and to pass over it for that purpose, upon foot, and with horses and carriages, notwithstanding the part on which the right is claimed, is, as to its soil, vested in a particular individual, and although that individual has an exclusive right of fishing in that place with stake nets, and of driving these stakes into the soil, that they may support the nets. And I am of opinion, that there is no such common law right. By the sea-shore, I understand the space between the ordinary high and low water mark; and the property in this is, *prima facie*, in the king. It may, indeed, by grant or prescription belong to a subject, but until the contrary is shewn, the presumption is, that it belongs to the king. Many of the king's rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation, and of fishing; and it is so in highways, along which all his subjects have the right of passage, and the king can make no modern grants in derogation of those rights. I have mentioned the rights of navigation and of fishing, because I can find no trace of such a right as that now claimed recognized in any of our books. It is material to distinguish between the different descriptions of rights which

and the public may have a right of navigation, which is for the general benefit of all the kingdom; and a right of fishing, which tends to the sustenance and beneficial employment of individuals; but it does not thence follow that they have also the right of bathing. The existence or the extent of the subject's right is to be collected in this, as in other instances, from the manner in which the sea-shores throughout the kingdom have from time immemorial been used, and from legal authorities upon the subject. The right, as claimed, is not confined to any particular place, if it exists at all, but it must exist upon every part of the sea-shore. Every private building, then, erected upon the sea-shore, and even wharfs and quays, would be an obstruction to that right, and, of consequence, abatable or indictable. And yet, in how many instances are such buildings, wharfs, and quays erected? Every embankment by which land is redeemed from the sea would obstruct the exercise of this right, and be a nuisance, and so would the erection of stakes for holding nets; and yet, how frequently are such embankments made, and such stakes set up? A distinction has, indeed, been contended for between wharfs and quays, and other erections for public benefit, and for the interests of trade and commerce, and erections for private purposes; but in how many instances are there buildings for private purposes on the sea-shore? Where an erection is made on the sea-shore without authority, the crown may treat it as a purpresture, and prosecute it accordingly; but it has never yet been held, abatable or indictable, because it happens to interfere with a supposed common-law right of bathing. Indeed, this is the first time, as far as I can learn, that such a right was ever stated upon any pleadings, or contended

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for in any court of law; and the inconveniences which would result from such a right afford to my mind a strong argument against its existence. In sea-bathing, as it now prevails, particular regulations are desirable; the restriction of particular machines to particular spots; a separation of those which are for men from those which are for females; and the prevention of contests as to particular situations. Bathers who do not use machines should be in places of greater privacy, and at a distance from those parts which are generally used for the recreation of walking; and yet the existence of this common-law right would be a great obstruction to any such regulations. Indeed, if an individual had the grant of the sea-shore from the crown, and were using it for recreation or bathing, he or his family might be interrupted and deprived of all privacy by the exercise of this common-law right. Let it be observed, too, that the whole shore cannot be necessary for the exercise of this supposed right, and that it may be desirable to apply parts of the sea-shore to other purposes. The king, for the public welfare, may suffer such a right to be exercised in those parts of the shore which remain in his hands to any extent which the convenience of the public may require; but may he not also allow other rights to be exercised on other parts? If the soil is vested in an individual, is he to be deprived of the right of saying how that soil shall be used, and of the privilege of making any regulations he may think fit? In those places in which convenience has required the right, and it has continued from the time of legal memory, there will be a right by custom; and, where that is not the case, the crown, or its grantees, are not likely to withhold it, upon proper terms,

and

and under proper regulations. The case of *Bagott v. Orr* (a) seems to me to conclude nothing on the right in question. The defendant there justified trespassing on the rocks and sands lying within the flowing and reflowing of the tide, on the ground that every subject of the realm had the liberty and privilege of getting and taking away shell-fish and shells which had been left there by the tide. The general right of the public to take fish of the sea was admitted in argument; but the right to take shells cast on the shore was denied; and it was insisted, besides, that the general right was excluded where the shore was parcel of a manor. The Court thought that the plaintiff should have replied specially to have raised the question as to excluding the general right; but they thought the claim as to the shells so questionable, that they offered the defendant leave to amend, by confining his claim to the sea-fish, and that offer the defendant accepted. The claim, therefore, in that case, was very different from the present; it was a claim for something serving to the sustenance of man, not a matter of recreation only, — a claim to take, when left by the water, what every subject had an undoubted right to have taken whilst they remained in the water; and upon that claim there was no regular judgment. But it would by no means follow because all the king's subjects have a right to pick up fish on the shore, that they have, therefore, a right to pass over the sea-shore for the purpose of bathing. The passages cited from Lord *Hale's* treatise, *De Jure Maris*, p. 22 and 36., in which it is laid down, "that the jus privatum that is acquired to the subject, either by patent or prescription, must not prejudice the

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jus publicum, wherewith public rivers or arms of the sea are affected for public use ;" leave the question untouched ; because the question in this case is, what the *jus publicum* is : and that they do not define. Had Lord *Hale* stated as part of the *jus publicum*, that the public might use the shore as they thought fit ; that they might use it as a public highway, or for the purpose of bathing ; then those passages would have been authorities applicable to this case. But Lord *Hale*, in fact, only states that the *jus publicum* continues to exist, without defining what it is. *Bracton*, in l. 1. c. 12. s. 6., does state what the *jus publicum* is ; and if that passage be good law, it is a strong authority in favour of the defendant. The passage is as follows : " *Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus.*" Now, he does not even say navigable rivers ; but I will assume that by *fluminibus* is meant navigable rivers, and so far as I have cited the passage, I concur in what is there laid down ; but he goes on : " *Riparum etiam usus publicus est jure gentium sicut ipsius fluminis.*" That is, that the public have the same right to use the banks of the river that they have to use the river itself, and that, because the water is common to all mankind, the *ripa* is also common to all mankind. The passage then goes on, " *Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuvis liberum est, sicut per ipsum fluvium navigare.*" The word " *ripa*" here applies to rivers and ports, and probably, also, to the land above the high-water mark ; and, if it do, is this the law of *England*? have all persons a right to fasten a ship to the banks of a river, or have they a right to tie ropes to the trees, or to land goods on the banks of every navigable river ?

river? The case of *Ball v. Herbert* (*a*) is not a distinct authority upon this point, inasmuch as in that case, the right of towing was claimed. But the general question as to the right of the public on the *ripa* of a navigable river was discussed, and the Court appear to have been of opinion, that the *ripa* of a navigable river was not *publici juris*, and they therefore virtually overruled the authority of *Bracton*. Lord *Hale*, in his treatise, *De Portibus Maris*, p. 84., after citing this passage, says, "As touching ports, and the public right of them, *Bracton* saith true; with this allay, that hath been before observed, that the law of *England* doth thus far abridge that common liberty of ports, that no port can be erected without the licence or charter of the king, or that which presumes and supplies it, viz. custom and prescription." But in another passage (*b*), Lord *Hale* says, "Though *A.* may have the propriety of a creek or harbour, or navigable river, yet the king may grant there the liberty of a port to *B.*, and so the interest of propriety, and the interest of franchise, several and divided. And in this, no injury is at all done to *A.*, for he hath what he had before, viz. the interest of the soil, and consequently the improvement of the shore, and the liberty of fishing; and as the creek was free for any one to pass in it against all but the king, (for it was *publici juris* as to that matter before,) so now the king takes off that restraint, and by his licence and charter, makes it free for all to come and unlade. But if *A.* hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa* without his consent, unless custom had made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the

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(*a*) 3 Term Rep. 262.(*b*) Page 75.

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private interest of *A.*, which may not be taken from him without such consent." There may perhaps be a distinction between the ripa of the river where the soil has been long private property, and that space between the high and low water mark, where the sea ebbs and flows but if there be such a distinction, what becomes of the authority of *Bracton*, where he says, "Riparum etiam usus publicus, est jure gentium sicut ipsius fluminis." No man can travel through this kingdom along the banks of rivers, without seeing that private rights, exclusive of public rights, exist there, and every one of those rights is at variance with the doctrine of *Bracton*, and with the supposed common law right now claimed. The practice of bathing may contribute to health, but it ought to be confined within reasonable limits, and it is by no means necessary, that the right should be co-extensive with the whole shore of the sea, or that it should extend to places where the right of fishing with stake nets exists. In the absence of any authority, to shew that such right exists, and thinking that the authorities cited do not establish it, and that it would be attended with great inconvenience to the public, if a general right, free from all regulation by the owner of the soil was to be exercised throughout the whole of the kingdom, I am of opinion, that no such right exists, and consequently, that there ought to be judgment for the plaintiff.

ABBOTT C. J. I have considered this case with very great attention, from the respect I entertain on this and all other occasions for the opinion of my learned Brother *Bent*, though I had no doubt upon the question when it was first presented to me; nor did the defendant's counsel

counsel raise any doubt in my mind by his learned and ingenious argument. This is an action of trespass, brought against the defendant for passing with carriages from some place above high-water mark across that part of the shore which lies between the high and low-water mark, for the conveyance of persons to and from the water for the purpose of bathing. The plaintiff is the undoubted owner of the soil of this part of the shore, and has the exclusive right of fishing thereon with stake-nets. The defendant does not rely upon any special custom or prescription for his justification, but insists on a common law right for all the king's subjects to bathe on the sea shore, and to pass over it for that purpose on foot, and with horses and carriages; and this right is the only matter which, by the terms of the special case, is submitted to the opinion of the Court. Now, if such a common law right existed, there would probably be some mention of it in our books; but none is found in any book, ancient or modern. If the right exist now, it must have existed at all times; but we know that sea bathing was, until a time comparatively modern, a matter of no frequent occurrence, and that the carriages, by which the practice has been facilitated and extended, are of comparatively modern invention.

There being no authority in favour of the affirmative of the question, in the terms in which it is proposed, it has been placed in argument at the bar on a broader ground; and as the waters of the sea are open to the use of all persons for all lawful purposes, it has been contended, as a general proposition, that there must be an equally universal right of access to them, for all such purposes, over land like the present. If this could be established,

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established, the defendant must undoubtedly prevail; because, bathing in the waters of the sea is, generally speaking, a lawful purpose. But, in my opinion, there is no sufficient ground, either in authority or in reason, to support this general proposition.

Commerce is a matter greatly favoured in our law, by reason of the public and national benefits derived from it; but, even as to this favoured matter, I have found no authority in the law of *England* in support of such a proposition. *Bracton*, in the passage so often referred to, speaks not of the waters of the sea generally, but of ports and navigable rivers. It may be admitted, that whatever is true of navigable rivers and their banks, may be true of the sea and of its shore. But the case of *Ball v. Herbert* (a) shews that the doctrine of *Bracton*, as to the banks of navigable rivers, however warranted by the civil law, is not conformable to the law of *England*. "And as touching ports, and the public right to them," says Lord *Hale*, p. 84., "*Bracton* saith true: but, with this alloy, that the law of *England* doth thus far abridge that common liberty of ports, that no port can be erected without the licence or charter of the king, or that which presumes and supposes it, viz. custom and prescription." So that even the privilege to be derived from ports cannot be in its nature universal. And, as to ports, Lord *Hale*, ch. 6. p. 73., distinguishes between the interest of property and the interest of franchise, and says, that "if *A.* hath the ripa or bank of the port, the king cannot grant liberty to unlade on the bank or ripa without his consent, unless custom hath made the liberty thereof free to all, as in many places it is." Now,

(a) *S. T. R.* 261.

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such consent as applied to the natural state of the ripa or bank would be wholly unnecessary, if every man had a right to land his goods on every part of the shore at his pleasure. And, if there be no general right to unlade merchandize on the shore, there can be no right to traverse the shore with carriages or otherwise for the purpose of unloading; and, consequently, the general proposition to which I have alluded cannot be maintained as a legitimate conclusion from the general right to navigate the water. I have spoken of merchandize, and not of fish; from the latter I studiously abstain, because no question of that kind is before the Court, and it is unnecessary to say any thing upon it. It will be remembered, also, that I speak only of the general right, which is a matter perfectly distinct from those cases of necessity that often arise out of the perils of navigation. Having thus shewn that the general proposition cannot, in my opinion, be maintained, I return to the particular right or privilege claimed in the present case.

One of the topics urged at the bar in favour of this supposed right was that of public convenience. Public convenience, however, is, in all cases, to be viewed with a due regard to private property, the protection whereof is one of the distinguishing characteristics of the law of *England*. It is true, that property of the description of the present is, in general, of little value to its owner; but I do not know how that little is to be protected, and much less how it is ever to be increased, if such a general right be established. If there be a general right of passage across land of this description in the nature of a highway, by what law are stake-nets, or other implements of fishing, to be placed there, or sand or stones to be taken away, whereby the exercise of the right

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which, as claimed, will, in its universality, extend itself over every part of the surface, may be obstructed, or rendered less convenient? By what law can any wharf or quay be made? These, in order to be useful, must be below the high-water mark, that vessels or boats may float to them when the tide is in; but when the tide is out, no carriage can pass them. In some parts of the coast, where the ground is nearly level, the tide ebbs to a great distance, and leaves dry very considerable tracts of land. In such situations, thousands of acres have, at different times, been gained from the sea and its arms by embankments, and converted to pasture or tillage. But how could such improvements have been made, or how can they be made hereafter, without the destruction or infringement of this supposed right? And, it is to be observed, that wharfs, quays, and embankments, and intakes from the sea, are matters of public as well as private benefit.

Another topic relied upon by the defendant was usage and practice. The practice of modern times can be considered, at the utmost, in the nature only of evidence, more or less cogent according to its extent and uniformity. I am not aware of any practice, in this matter, sufficiently extensive or uniform to be the foundation of a judicial decision. It was said at the bar, that in some places a compensation is made to the owner of the shore; but I do not rely on this assertion as a ground of judgment. In many places, doubtless, nothing is paid. In some parts, the king is the owner of the shore; and it is not probable that any obstruction would be interposed on his behalf to such a practice. Of private owners, some may not have thought it worth while to advance any claim or opposition; others may

have

have had too much discretion to put their title to the soil to the hazard of a trial by an unpopular claim to a matter of little value; others, and probably the greater part, may have derived or expected so much benefit from the increased value given to their own land above by the erection of houses and the resort of company, that their own interest may have induced them to acquiesce in, and even to encourage the practice, as a matter indirectly profitable to themselves. But, further, the practice, as far at least as I am acquainted with it, differs in degree only, and not in kind or quality, from that which prevails as to some inland wastes and commons; and even the difference in degree is, in some instances, not very great. Many of those persons who reside in the vicinity of wastes and commons, walk or ride on horseback, in all directions, over them, for their health and recreation; and sometimes, even in carriages, deviate from the public paths into those parts which may be so traversed with safety. In the neighbourhood of some frequented watering-places, this practice prevails to a very great degree; yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil.

The only remaining topic adduced for the defendant was, that the right may be considered as confined to those instances only wherein it can be exercised without actual prejudice to the owner of the shore, and subject to all modes of present use, or future improvement, on his part; but no instance of any public right, so limited and qualified, has been found. Every public right to be exercised over the land of an individual is, pro tanto, a diminution of his private rights and enjoyments, both

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present and future, so far as they may at any time interfere with or obstruct the public right.

But, shall the owner of the soil be allowed to bring an action against any person who may drive his carriage along these parts of the sea shore, whereby not the smallest injury is done to the owner? The law has provided suitable checks to frivolous and vexatious suits; and, in general, experience shews that the owners of the shore do not trouble themselves or others for such matters. But where one man endeavours to make his own special profit by conveying persons over the soil of another, and claims a public right to do so, as in the present case, it does not seem to me that he has any just reason to complain, if the owner of the soil shall insist upon participating in the profit, and endeavour to maintain his own private right, and preserve the evidence thereof. For these reasons, I am of opinion that there is not any such common law right as the defendant has claimed.

Judgment for the Plaintiff.

END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

1822.

IN THIS

Court of KING's BENCH,

III

Hilary Term,

In the Second and Third Years of the Reign of
GEORGE IV.

HAYWARD against HORNER. (a)

Thursday,
January 10th.

DECLARATION in debt, on the statute 5 and 6 ^{Essex, c. 14. s. 4.} In order to com-
plaints the of-
pete, against defendant as an unqualified fence of keeping
person, for keeping, on different days in March, 1821, a setting-dog, to kill and destroy game. Plea, nil debet. At the trial, before Burrough J., at the last assizes for the county of Essex, it was proved by the plaintiff's game-keeper, that the defendant, during the year 1821, had kept a setting-dog, which he had seen him use in 1819. There was no proof that any use had been made of the dog. It appeared that, at the time when the alleged offence was charged to have been committed, the dog was tied up, and never went out into the field with its master, this was held not to be an offence within the statute.

(a) This and several following cases were argued at the sittings before

CASES IN HILARY TERM

1822.

 HAYWARD
against
 HOOPER.

dog by the defendant during the last season ; and on the contrary, his servant proved, that, subsequently to the shooting season, which commenced in *September*, 1819, the dog had generally been tied up, and that he had never seen his master take it out into the field after *January*, 1820. It was contended by *Gurney*, for the defendant, on the authority of the case of *Read v. Phelps* (a), that the mere fact of keeping a sporting-dog was not evidence of keeping it for the purpose of destroying game; and that, in order to constitute an offence within the statute, the dog must be kept for the purpose of killing or destroying game. The learned Judge was of opinion, that in an action of this sort it was sufficient to prove the keeping of any of the dogs mentioned in the 22 and 23 Car. 2. c. 25., the 4 and 5 W. & M. c. 25., and 5 Anne, c. 14.; the legislature having considered such dogs to be dogs for the destruction of game. He therefore directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last term.

Marryat now shewed cause. The statute enacts, that an unqualified person who shall keep or use any greyhounds, setting-dog, &c., to kill and destroy game, shall be liable to a penalty. The words to kill or destroy game, apply only to the using of the dogs, and not to the mere keeping. Two offences are created, one for keeping, the other for using. The statute does not say that the dogs must be kept for the purpose of destroying the game ; but to make a party guilty of the offence of

(a) 15 East, 271.

using the dog, it must have been used to kill and destroy game. In *Read v. Phelps* (a) the dog was so young that it could not have been used to kill game. In *Wingfield v. Stratford* (b) Lee C. J. takes this distinction; "As greyhounds, setting-dogs, &c. are expressly mentioned in this statute, it is not necessary to allege that any of these have been used for killing or destroying game, and the rather as they can scarcely be kept for any other purpose than to kill and destroy game. But as guns are not expressly mentioned, and as a gun may be kept for the defence of a man's house, and for other lawful purposes, it is necessary to allege, in order to its being comprehended within the meaning of the words 'any other engines to kill the game,' that the gun had been used for killing the game."

1822.

 HAYWARD
against
 HORNER.

Gurney, contra, was stopped by the Court.

ABBOTT C. J. I am clearly of opinion, that, in order to constitute an offence within the statute 5 and 6 Anne, c. 14. s. 4., the dog must be kept or used for the purpose of killing or destroying game. It did not appear in this case, that, at the time when the offences charged were alleged to have been committed, the dog was kept for that purpose. I think, therefore, that the verdict was wrong, and that the rule for entering a nonsuit must be made absolute.

BAYLEY J. I am of the same opinion. The words "to kill and destroy game," apply to both the precedent words "keep or use." It is usual in pleading to

(a) 15 East, 271.

(b) *Sayer*, 15. 1 W&S. 515. *S. C.*

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against
HORNER.

allege, that the dogs are kept to kill and destroy game; now such an allegation would be wholly unnecessary, if the words kill and destroy game did not apply to all the precedent words. Generally speaking, the very keeping of a dog of the description mentioned in the act would be *prima facie* evidence that it was kept for that purpose; but, supposing it to be proved, on the other hand, that the dog was tied up during the day and let loose only at night, the jury would fairly be warranted in presuming, that it was kept for the defence of the house, and not for the purpose of destroying game. Indeed, these dogs are frequently kept for the purposes of sale. Now it is perfectly clear, that a person so keeping them, is not liable to the penalties of this act of parliament.

HOLROYD J. I am of the same opinion. In the case cited from *Sayer*, Lord Chief Justice *Lee* only says, "That it is not necessary to allege that the specified dogs were used for the purpose of killing game." That case does not apply to the present, where the offence is the keeping of dogs for that purpose. This very point arose in the case of *Briarly v. Athorpe*, which was tried the *Lent assizes*, 1792, before *Buller J.*, at *York (a)*; and

(a) BRIARLY against ATHORPE.

Coram Buller J., Yorkshire Lent Assizes, 1792.

TROVER for a pointer-dog, seized by the defendant, lord of the manor and a justice of the peace, as being in the custody of an unqualified person. Cockell Serjt., for the plaintiff, insisted, that the defendant had not, either as lord of the manor or as a justice of the peace, a right to seize the dog. First, as not being a setting-dog, nor included within the act (stat.

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and he was of opinion, that, in order to bring the case within the statute, it was essential that the dog should be kept for the purpose of killing and destroying game.

1822.

 HAYWARD
against
HORNSEA.

BEST J. I am of the same opinion. This is a penal statute, and ought, therefore, to be construed strictly. The keeping or using a dog, of the particular description mentioned in the statute, to kill and destroy the game, constitute two distinct offences; and I am of opinion, that the mere keeping of such a dog does not constitute an offence, unless it be for the purpose of killing and destroying game. The mere keeping of such a dog may, indeed, be *prima facie* evidence of the purpose for which it is kept. In this case, however, it

5 and 6 Anne, c. 14.). Secondly, as not being kept for the purpose of killing game, but as a house-dog, and for defence, plaintiff having used the dog to kill game before he sold his estate, which qualified him, but never since, having kept him expressly for the purpose of a house-dog.

BULLER J. The first question is, whether a pointer is a setting-dog within the act. I am of opinion, a pointer is within the act of parliament.

It is a well known rule, in expounding acts of parliament, to consider all the acts in pari materia. Stat. 22 and 23 Car. 2. c. 25. & 2, mentions other dogs. A setting-dog, I think, means any dog who *stops* at his game. But it is essential that it must be kept or used to kill game. If not, the word greyhound would extend to an *Italian* greyhound kept by a lady for her amusement. So "hays." There is no difference that I know between hays and a cabbage-net; but keeping a cabbage-net or hays to put over cabbages is not unlawful. It must be kept or used to kill game, to entitle the lord to seize. If you (the jury) think the dog was used to kill game in September or October, 1790, being since the plaintiff sold his property, there must be a verdict for the defendant. If not, then the plaintiff is entitled to a verdict.

Verdict for plaintiff, damages 10*s.*

See *Rex v. Fifer, Strange*, 496. *Rex v. Gardner, Strange*, 1098. *Rex v. Thompson*, 2 T. R. 18.

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 HAYWARD
 against
 HUNTER,

has been considered as conclusive evidence of that purpose. Here there was proof to rebut the *prima facie* presumption ; for it was in evidence, that the dog, during the time in which the offence is laid in the declaration, was generally tied up, and never followed his master. I think, therefore, that in this case there was strong evidence to go to the jury, that the dog was not kept for the purpose of killing and destroying the game, and that the jury would have been warranted in coming to that conclusion. That being so, I think that the rule for entering a nonsuit ought to be made absolute.

Rule absolute.

DUNK *against* HUNTER.

A landlord has no right to distrain, unless there be an actual demise to the tenant at a fixed rent; and, therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for 21 years, at the net clear rent of 6*s*., the tenant to enter any time on or before a particular day : Held, that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain.

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an agreement between Mrs. *Ann Hunter*, of *Southwick*, and *David Dunk*, of *Brighton*, butcher. Mrs. *Ann Hunter* agrees to let on lease, with purchasing clause, for the term of 21 years, all that house and premises, *St. James's Street*, present tenant *Thomas Lawler*, entering on the said premises by *D. Dunk*, any time on or before the 11th day of *February*, 1820, at the net clear rent of 63*l.* per year, and to keep all premises in as good repair as when taken to (reasonable wear allowed), paying on entry 50*l.* in ready cash, and the rent payable quarterly. The term for 7, 14, or 21 years, which term Mr. *D. Dunk* is to give one clear year's notice, before the expiration of either of the above term of years, if he intends to leave; if purchases before the expiration of the above term by *D. Dunk*, he is to pay on purchase 1000 guineas." (a) The plaintiff, under this agreement, paid the sum of 50*l.* on the 10th *February*, 1820; but in consequence, as it was said, of some arrangement between him and the former tenant, he did not enter into the occupation of the premises till the 10th *April* following. In the *March* preceding, an application was made, and a lease tendered to the defendant to execute, but she declined to do so, saying she had found that she could not grant one. No rent had been paid by the plaintiff. The jury found a verdict for the defendant. *Marryat*, in last *Michaelmas* term, obtained a rule nisi for entering a verdict for the plaintiff, on the ground that the above agreement did not amount to a lease; and that, unless the plaintiff held under a demise, at a specific rent, the defendant had no right to distrain for rent-arrear. And now

1822.

Dunk
against
Hunter.

(a) This is a copy of the original memorandum, except that the spelling has been corrected.

1822.

Donk
against
Hurrell.

Gurney and Courthope shewed cause. In this case, the plaintiff was tenant to the defendant, for the agreement amounted to a lease. Here the defendant agreed to let at a specified rent, and the plaintiff has paid the 50*l.*, and entered into possession under the agreement. He cannot, therefore, now say, that he did not hold at that rent. Then, the rent being due, the distress was legal. *Tempest v. Rawling.* (a)

Marryat and Chitty, contra. There must be a demise at a specific rent, in order to entitle a landlord to distrain. He cannot distrain for a quantum meruit. The only remedy in such a case is, by an action for use and occupation. Then if so, the question is, whether this is an agreement for a lease, or a lease; and clearly, it is the former only. Here it specifies, that defendant agrees to let on lease with a purchasing clause; that shews a future lease must have been contemplated. The rent, too, must mainly depend, for its amount, on the beneficial clauses which were to be introduced into the future lease. *Hegan v. Johnson* (b) is not distinguishable from the present case. As to *Tempest v. Rawling*, there is this distinction, that in that case there had been a payment of rent; which there has not been here.

ABBOTT C. J. On looking through the whole of this instrument, which has obviously been framed by an unlettered person, it appears to me, that this is only an agreement preparatory to a demise, and not an actual demise. If it had been the latter, then the defendant

(a) 13 East, 18.

(b) 2 Taunton, 142.

would

would have been entitled to distrain for the rent. But it seems to me that it is not so. It has not any one of the forms of a lease. It begins thus, "Memorandum of an agreement; Mrs. Anne Hunter agrees to let on lease" (which obviously means to execute a lease) "with a purchasing clause for the term of 21 years, the tenant to enter on the premises at any time on or before the 11th February, 1820, &c." Now, looking at this instrument, I cannot infer when the tenancy was to commence or the rent to become due. The whole is left in doubt, and it is manifest that this was intended as a mere memorandum of an agreement to grant a future lease. Then the question is, whether the allegation in the avowry is sustained by the proof. A party has no right to distrain, unless there be a fixed rent agreed upon; if that be not so, the law gives him a remedy by the action for use and occupation. There can be no distress, unless there be a contract for an actual demise at a specific sum. Where the language of the instrument is such, as to make it a valid contract until something further be done, such instruments have, in some cases, after an actual enjoyment under them, been held to amount to an actual demise. But here, it does not amount to a demise at a certain rent, and therefore the defendant was not entitled to distrain, and cannot sustain the allegation in the avowry. The rule must therefore be made absolute.

BAYLEY J. The allegation in the avowry is, that the plaintiff held the premises as tenant thereof to the defendant, by virtue of a demise thereof to him the plaintiff theretofore made. The first question is, whether this memorandum of an agreement amounts to a
demise

1822.

Dowic
against
Hunter

1822.

David
against
Hennet.

demise for 21 years. If it does, then the allegation in the avowry is made out in evidence. In the case of *Morgan v. Bissell* (a), the rule is laid down thus, that although there are words of present demise, yet if you collect on the face of the instrument, the intent of the parties to give a future lease, it shall be considered an agreement only. It is clear in this case, that the memorandum of agreement was not intended to operate as a present demise. We cannot ascertain from the language of the instrument, when the term was to commence. There are no words of demise, nor any words from which a warranty of title may be implied, as would be the case if the word "grant" had been inserted. The meaning of the parties seems to have been, that if the defendant entered before the 11th *February*, the term was to commence from the period of such entry. Upon the whole, therefore, it seems to me, that the parties contemplated the execution of a future lease. Then, if this was not an actual demise for 21 years, the party did not at all events hold at the annual rent of 6*£l.*, and if so, the plaintiff by law could not distrain, the rent not being fixed. If a person bargains for a lease for 21 years, the rent is estimated upon an average for the whole term, and it may be of no benefit to the party whatever for the first year of his occupation. Here, the rent of 6*£l.* is estimated on the terms of there being a lease granted, and at the time when the distress was made, no lease was granted, and no payment of rent had taken place. I think, therefore, that the plaintiff did not hold the premises at any specific rent, and that the defendant's only remedy was by an action for use and

(a) *5 Taunt.* 65.

occu-

occupation, in which the amount of the rent would be a question to be left to the jury. This rule, therefore, must be made absolute.

1322.

DUNK
against
HUNTER.

HOLROYD J. I am of opinion that the defendant was not entitled to distrain. This did not operate as a present demise, but was a mere agreement to let in future, and by a different instrument. And there is nothing to shew, that it was the intention of the defendant to part with the premises until that instrument was executed. It is clear, that an agreement to grant a lease does not amount to a letting. Besides, in this case, there are subsequent words relative to the introduction of a clause for purchasing, which shew, that the letting was to be by a particular instrument containing such a clause. And in addition to this, the stipulation as to the payment of 50*l.* upon entry, is quite inconsistent with this being an actual demise. For if it were an actual demise, the tenant would have had a right to enter immediately without paying that sum. I think, therefore, that the defendant was not entitled to distrain, and that the rule must be made absolute.

BEST J. concurred.

Rule absolute.

1822.

WEST against ANDREWS.

I. S. being the master of the workhouse, appointed by, and receiving orders from, the guardians of the poor of the parish of *W.* bought provisions from *A.* *B.* one of such guardians:
Held, that *A.* *B.* was liable to the penalty of 100*l.*, imposed by the 55 G. 3. c. 137. s. 6.

DEBT on 55 G. 3. c. 137. s. 6. for a penalty of 100*l.* Declaration stated, that defendant, on 1st June, 1820, was overseer of the poor of *Westhamperett*, in *Sussex*, and during the time he was overseer, furnished and supplied in his own name, goods and provisions for the support of the poor. The second count described him as a person in whose hands the collection of the rates was. Plea general issue. At the trial before *Borough J.*, at the last assizes for the county of *Sussex*, it appeared that defendant was one of the guardians of the poor for the parish, and that the poor-house there was under their controul, being managed by one Griffiths, who was the master of the poor-house appointed by the guardians, and receiving his orders from them. Griffiths provided for the poor, having a contract at so much per head, and found all the meat, &c. In the year 1820, he bought of the defendant, then being such guardian of the poor, four live sheep for the use of the poor, and paid him for them. The learned Judge thought this not a case within the act, and directed a non-suit. *Gurney* having in last *Michaelmas* term obtained a rule nisi for a new trial.

Marryat shewed cause. Here, the defendant did not supply the sheep to the parish, and had therefore no claim on the parish. His claim was solely on Griffiths, who had a standing contract with the parish, and full liberty to buy from whom he pleased. The object of the

the act was, to prevent overseers from availing themselves of their situation, to force their goods on the parish. In *Proctor v. Manwaring* (*a*), and *Pope v. Backhouse* (*b*), the articles were supplied to the individuals receiving relief. Here, that was not the case. If any complaint was made of the provisions supplied, it would be made not to the defendant alone, but to the whole body of guardians.

1822.

West
against
ANDREWS.

Gurney and Merewether, contra. The case falls within the words and mischief intended to be remedied by the act. If this be allowed, one guardian may supply meat, another flour, &c.; and then, although complaint might be made to the general body, yet they would be all interested not to do justice.

ABBOTT C. J. -I am of opinion, that this is a case within the act of parliament. Here the defendant has made a bargain for the supply of provisions with a third person, who has the contract for providing for the poor, and whom the defendant, in conjunction with others, appoints to his situation, and whose conduct it is his duty to superintend. Under these circumstances, it seems to me, that all the mischief which was contemplated by the legislature would arise, if we were to hold that it was lawful. I am therefore clearly of opinion, that the defendant's case falls both within the words and spirit of the act of parliament, and that the rule for a new trial must therefore be made absolute.

Rule absolute.

(*a*) 3 B. & A. 145.

(*b*) 2 B. Moore, 187.

1822.

GURNEY and Others *against* LANGLANDS.

An issue having been directed to satisfy the court as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence satisfactory to the judge who tried the cause, and to the court upon his report of it. In the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, from his knowledge of hand writing in general, that the signature in question was not genuine, but an imitation; this evidence having been rejected, the court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight, and that the issue being to satisfy the court, a new trial ought not

to be granted, unless for the rejection of evidence which might reasonably have altered the verdict. Quare, if such evidence be admissible at all.

FEIGNED issue directed by the Court of King's Bench, to try whether the supposed signature of *Thomas Gurney* the plaintiff, to a certain warrant of attorney, dated 16th April, 1821, was forged. At the trial before *Wood B.*, at the last assizes for *Surrey*, the plaintiff, in support of the affirmative of the issue, tendered the evidence of *Joseph Hume*, inspector of franks at the post-office, who stated, that he was unacquainted with the plaintiff's hand-writing, and was then asked the following question: "From your knowledge of hand-writing, do you believe the hand-writing in question to be a genuine signature, or an imitation." This question was objected to, and the objection allowed by the learned Judge, who stated in his report the following reasons: "When a witness has seen another write, or has, by receiving notes or letters from him, become acquainted with his hand-writing, he has a ground of forming a belief as to it. But where, as in this case, he acknowledges that he had not any previous acquaintance whatever with the hand-writing of the plaintiff, he could not, as I conceived, have any foundation for his opinion or belief, whether the signature in question was genuine or only an imitation; for he had never seen or had any knowledge of that of which it was supposed to be an imitation. There is no general known standard by which hand-writing can

upon

upon inspection only be determined to be counterfeited without some previous knowledge of the genuine hand-writing, the hand-writings of men being as various as their faces. Opinions of skilful engineers and mariners, &c. may be given in evidence in matters depending upon skill, viz. as to what effect an embankment in a particular situation may have upon a harbour, or whether a ship has been navigated skilfully. Because, in such cases, the witness has a knowledge of the alleged cause, and his skill enables him to judge and form a belief of the effect. I had never known such loose general evidence admitted, or even offered, and it struck me, that the admission of it would produce much mischief, and greatly endanger written securities." The evidence on the part of the defendant of the subscribing witnesses to the warrant of attorney and others, was so strong, that the jury declared themselves satisfied, and found a verdict for the defendant. *Knowlys*, in last Michaelmas term, obtained a rule nisi for a new trial, on the ground that this evidence was admissible, and had been rejected. And now,

Marryat and *Gurney* shewed cause, and suggested that, this being an issue to satisfy the conscience of the Court, a new trial ought not to be granted, unless evidence of a cogent nature had been rejected. And they contended, that whether this was admissible or not, still that, at all events, it could not have produced any alteration in the verdict.

Knowlys and *Chitty*, contrà. *Goodtitle dem. Revett v. Braham* (a), and *Rex v. Cator* (b), establish the admiss-

(a) 4 T. R. 497.

(b) 4 Ep. 117.

sibility

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sibility of the evidence. In *Birch v. Crewe, London* sittings after Trinity term, 1821, the same evidence here offered was received by Abbott C. J. It is impossible to say what effect it might have produced on the jury, because, if not overruled, it would have been followed up by the evidence of many other skilful persons to the same effect. And when evidence has been wholly excluded, the Court will not weigh very nicely what effect it might have had if received.

ABBOTT C. J. I have long been of opinion, that evidence of this description, whether in strictness of law receivable or not, ought, if received, to have no great weight given to it. This was an issue directed by the Court, in order to enable them to come to a satisfactory conclusion upon a rule pending before them. The other evidence in this case was of so cogent a description as to have produced a verdict satisfactory to the Judge who tried the cause; and I can pronounce my judgment much more to my own satisfaction upon a verdict so found, than if this evidence had been admitted, and had produced a contrary verdict. For I think it much too loose to be the foundation of a judicial decision, either by judges or juries. The rule, therefore, for a new trial must be discharged.

BAYLEY J. concurred.

HOLROYD J. I have great doubt whether this is legal evidence; but I am perfectly clear that it is, if received, entitled to no weight; and this being an issue directed to satisfy the Court, we shall best exercise our discretion by refusing a new trial.

Best

Barr J. There can be no doubt that this is not, in all probability, the natural hand-writing of the party; for it is clear, that if at the time he wrote it he had the intention to dispute the deed, he would not sign it in his usual mode. The evidence, therefore, if received, would be entitled to no weight. It is impossible for any person to speak to hand-writing being an imitation, unless he has seen the original; and it does not appear to me necessarily to follow, that an inspector of franks has peculiar means of ascertaining imitated hand-writing. I think, at all events, this evidence was properly rejected, sufficient ground not having been previously laid for receiving it. But still, even if it was receivable, I am satisfied that, on the ground stated by my Lord Chief Justice, this rule ought to be discharged.

1822.

 GUANER
against
LANGLADE.

Rule discharged.

FAREBROTHER against SIMMONS.

A SSUMPSIT by the plaintiff, an auctioneer, against the defendant, for not taking or clearing away or paying the purchase-money, being 34*l.*, for a lot of turnips, standing and being on certain land. Second count, for crops of turnips bargained and sold, &c., and the usual money-counts. Plea, general issue. At the trial before Wood B., at the last assizes for the county of Surry, the only question was, whether there was a sufficient con-

The agent contemplated by the 17th sect. of the statute of frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and therefore, where an auctioneer wrote down the defendant's

name by his authority opposite to the lot purchased: Held, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute.

1822.

FAREBROTHER
against
SIMMONS.

tract in writing to satisfy the statute of frauds. It appeared that the contract given in evidence was the book in which the plaintiff himself had written down the different biddings opposite to the lots, and which book had been duly stamped. The learned Judge directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter a nonsuit. *Marryat*, in last Michaelmas term, obtained a rule nisi for that purpose, and cited *Wright v. Dannah* (a).

Gurney and *Abraham* now shewed cause. This was no interest in land; for the turnips having ceased to grow, the land merely was a warehouse for them. But even if this be not so, the book is sufficient to take the case out of the statute. For the plaintiff may be considered as the agent of both himself and the defendant for the purpose of reducing the contract into writing. The case of *Wright v. Dannah* is distinguishable. There the party who wrote the memorandum was the person who made the sale for his own benefit. Here it is the case of an auctioneer, who has no personal interest in the transaction.

ABBOTT C. J. The most favourable way for the plaintiff is to treat the question as a case of goods sold and delivered; and then, the goods being above the price of 10*l.*, the case will fall within the 17th section of the statute of frauds, which requires some note or memorandum in writing of the bargain, to be made and signed by the parties to be charged by it, or their agents, thereunto lawfully authorised. Now, the question is, whether the

(a) 2 Camp. 203.

writing

writing down the defendant's name by the plaintiff, with the authority of the defendant, be in law a signing by the defendant's agent. In general, an auctioneer may be considered as the agent and witness of both parties. But the difficulty arises, in this case, from the auctioneer suing as one of the contracting parties. The case of *Wright v. Dannah* seems to me to be in point, and fortifies the conclusion at which I have arrived, viz. that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record.

1822.

*FAREBROTH v.
against
Simmons,*

Rule absolute.

BENSLEY and Another *against* BIGNOLD.

ACTION by the plaintiffs, who were printers, to recover the sum of 92*l.* 5*s.* for printing a pamphlet, intitled, "An Elucidation of the System of Fire and Life Insurance." Part of the charge was for printing and part for paper. At the trial before Abbott C. J., at the London sittings after last Hilary term, the pamphlet was produced, and it purported to be printed by *Pinnock and Maunder*, 267, Strand, and not by the plaintiffs. It was objected, on the part of the defendant, that the plaintiffs could not recover, the 39 G. 3. c. 79. s. 27. having enacted, "That every person who shall print any paper or book whatsoever, which shall be meant or intended to be published or dispersed, whether the same shall be sold or given away, shall print upon the front of every such paper, if the same

A printer can-
not recover for
labour or ma-
terials used in
printing any
work, unless he
affixes his name
to it, pursuant
to the 39 G. 3.
c. 79. s. 27.

1822.

BENSLEY
against
BRENTWOOD.

shall be printed on one side only, and upon the first and last leaves of every paper or book which shall consist of more than one leaf, in legible characters, his or her name, and the name of the city, town, parish, or place, and also the name (if any) of the square, street, lane, court, or place in which his or her dwelling-house or usual place of abode shall be; and every person who shall omit so to print his name and place of abode, on every such paper or book printed by him, and also every person who shall publish or disperse, or assist in publishing or dispersing, either gratis or for money, any printed paper or book, which shall have been printed after the expiration of forty days from the passing of this act, and on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall, for every copy of such paper so published or dispersed by him, forfeit and pay the sum of 20*l.*" It was contended, that the statute being imperative, the printer must print his name, &c., and that the case must be governed by the same principles as those which had been applied to other prohibitory statutes; and *Ribbons v. Crickett* (*a*), *Lightfoot v. Tenant* (*b*), *Law v. Hodgson* (*c*), and *Langton v. Hughes* (*d*), were cited. The Lord Chief Justice directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last *Easter* term,

Scarlett and *F. Pollock* now shewed cause. The omission to insert the name of the printer on the pamph-

(*a*) 1 *Bos. & Pwl.* 264.
(*b*) 1 *Bos. & Pwl.* 551.

(*c*) 2 *Campb.* 147. 11 *East.* 300. *S. C.*
(*d*) 1 *Maule & Selw.* 593.

let in question does not constitute such a breach of the law as will prevent the plaintiffs recovering in this action. It is a well-established rule, that where an act creates a new offence, by prohibiting what was lawful before, and gives a specific remedy against such new offence, that remedy must be pursued. But if it be an offence at common law, an indictment is also maintainable. *Rex v. Robinson.* (a) And where newly-created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie; but where there is a particular prohibitory clause, specifying only particular remedies, those remedies must be pursued. *Rex v. Wright.* (b) The omission to insert the name of the printer was not an offence at common law. It was made so by a statute which contains no general prohibitory clause, but a particular clause, which is not prohibitory, specifying a particular remedy. It is not, therefore, an indictable offence; and, if not, it is not such a breach of a law as to operate as a bar to a demand otherwise just. It is true that, in *Marchant v. Evans* (c), the Court of Common Pleas decided that an action could not be maintained by a printer for printing and publishing a weekly periodical work, printed on stamped paper, and distributed as newspapers, unless the printer lodged his name at the stamp-office in an affidavit, or had his name and place of abode printed on some part of the publication, as required by the 38 G. 3. c. 78. s. 1. In that statute, however, there was a distinct prohibitory clause, without any specific penalty, and a separate clause with a penalty annexed. In the 39 G. 3. there is no prohibitory clause whatever,

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BIGNOLD.

(a) 2 Burr. 803.

(b) 1 Burr. 544.

(c) 2 B. Moore, 14.

CASES IN HILARY TERM

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Burglary
against
Bianca.

but merely a particular regulating clause, protected by a specific penalty. That case, therefore, confirms the distinction which has been laid down in many former cases, between a prohibition and a penal enactment. The cases cited at the trial are inapplicable to the present. *Law v. Hodgson* was decided on the ground of fraud, and the other three cases cited were cases of actual prohibition. In *Sullivan v. Greaves* (*a*), *Gallini v. Laborie* (*b*), *Steers v. Lashley* (*c*), *Brown v. Turner* (*d*), *Camden v. Anderson* (*e*), *Mitchell v. Cockburn* (*f*), *Booth v. Hodgson* (*g*), *Aubert v. Maze* (*h*), *Buck v. Buck* (*i*), *Lofthouse v. Wharton* (*k*), *Parkin v. Dick* (*l*), *Webb v. Brook* (*m*), *Merchant v. Evans* (*n*), and *Cainan v. Bryce*, either an indictment might have been supported at common law, or the statute in each particular case contained distinct words of prohibition, or such as rendered the contract null and void ab initio. The cases of *Tenant v. Elliott* (*o*), *Farmer v. Russell* (*p*), *Robinson v. Bland* (*q*), *Faikney v. Reynous* (*r*), and *Petrie v. Hannay* (*s*), are authorities to shew that a defendant is not allowed upon all occasions to avail himself of illegality as a protection against a just demand, even in transactions in contravention of the policy of particular statutes. In *Gremare v. Le Clerc Bois Valon* (*t*), it was held, that a person not licensed as a surgeon, according to the 3 Hen. 8. c. 11., may recover for business done on a quan-

- (*a*) *Park on Insurance*, 8.
- (*b*) 5 T. R. 242.
- (*c*) 6 T. R. 61.
- (*d*) 7 T. R. 650.
- (*e*) 1 Bos. & Pul. 272.
- (*f*) 2 H. R. 579.
- (*g*) 6 T. R. 405.
- (*h*) 2 Bos. & Pul. 371.
- (*i*) 1 Camb. 550.
- (*k*) 2 Camb. 221.

- (*l*) 5 Taunt. 6.
- (*m*) 2 B. Moore, 14.
- (*n*) 5 Barn. & A. 179.
- (*o*) 1 Bos. & Pul. 3.
- (*p*) 1 Bos. & Pul. 296.
- (*q*) 2 Burr. 1077.
- (*r*) 4 Burr. 2069,
- (*s*) 5 T. R. 419.
- (*t*) 2 Camb. 144.

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tum meruit, the act not being prohibitory, but merely penal. The words of the act are, "no person shall take upon himself to exercise physic or surgery, &c. without license, under penalty of 5*l.* per month." In *Hodgson v. Temple* (*a*), it was held, that a person selling spirits to a retail dealer, who is also a distiller, which union of trade is prohibited by the 26 G. 3. c. 73. s. 84. may recover, although he knew that the spirits were to be used in the distillery; and in *Johnson v. Hudson* (*b*), it was held, that an unlicensed dealer in tobacco might recover in an action for tobacco sold and delivered, notwithstanding the statute 29 Geo. 3. c. 68. s. 70. which enacts that every person who shall deal in tobacco shall, before he shall deal therein, take out a license, and by s. 7. this license was to be renewed yearly, under a penalty of 50*l.* The ground of the decision in that case was, that there was no clause whatever making the contract illegal, but that, at most, it was a mere breach of a revenue regulation, which was protected by a specific remedy. The three cases last cited are strong authorities in favour of the plaintiffs' right to recover in this action: besides, in this case, a great part of the plaintiffs' demand arises in respect of the paper provided by them for printing, and for that, at all events, they are entitled to recover.

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 BENSLY
against
BUENOLD.

Gurney, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion, that the rule, for entering a non-suit must be made absolute. Where a statute directs a particular thing to be done, it must be done. And if there be an omission to do the thing required, it is not any excuse that the party did

(*a*) 5 *Thom. 181.*

(*b*) 11 *East, 180.*

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not

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*BAYLEY
against
BROWNE.*

not intend to commit a fraud. This is a rule generally acted upon in the exchequer, in cases arising out of the breach of the revenue laws, by which particular things are directed to be done or omitted. The object of the 39 G. 3. c. 79., manifestly was to ascertain, 1st, who the printer of every publication is; and 2dly, through him to ascertain the author. The 27 sec. of that statute requires, that every person who shall print any paper or book, shall print upon the first and last leaves of such paper or book his or her name, (not the name of any employer,) and the name of his or her place of residence. The statute therefore contains a positive direction, that the name shall be so printed. Here, that has not been done, and the omission to print the name was a direct violation of the statute. And I am of opinion, that a party cannot be permitted to sue either for work and labour done or for materials provided, where the whole combined forms one entire subject matter, made in direct violation of the provisions of an act of parliament. The rule for entering a nonsuit must therefore be made absolute.

BAYLEY J. The 39 G. 3. c. 79., establishes several regulations for public purposes. It requires that certain acts shall be done, and makes it penal for any person to neglect to do those acts. The omission to do them is a direct violation of the law: and a party cannot be permitted, in a court of law, to recover for work and labour done in direct violation of the law. Where a provision is enacted for public purposes, I think that it makes no difference whether the thing be prohibited absolutely or only under a penalty. The public have an interest that the thing shall not be done,

done, and the objection in this case must prevail, not for the sake of the defendant, but for that of the public.

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BENSLAY
against
BUCKOLD.

HOLROYD J. The principle applicable to the present case, is fully established by many decided authorities. There does not appear to me to be any sound distinction between those cases where a statute requires a thing to be done, and where it prohibits it from being done. Here the act requires the printer's name to appear on the book, which is in effect the same, as if it prohibited him from printing any work without affixing his name to it. Supposing, however, that there is a distinction between those cases where a thing is prohibited generally, and where it is prohibited only under a penalty, in this case it is not merely prohibited under a penalty, for here the act expressly requires, that the printer's name shall be printed, which is the same thing as if it had expressly prohibited him from printing a work without doing so. The rule therefore must be absolute.

BEST J. The distinction between mala prohibita and mala in se has been long since exploded. It was not founded upon any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited, because it is against good morals, or whether it be prohibited, because it is against the interest of the state. The object of the 39 G. 3. was to provide the most effectual means of discovering the authors of every publication, in order that they might be made answerable for the contents, and for that purpose, it has directed, that all the parties concerned in bringing the publication into the world, whether printers

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~~PENALTY
against
BENOLD.~~

or publishers, shall be made known. Here, the printer's name has not been printed upon the publication as required by the act of parliament, and that being so, there is no legal contract on which an action can be founded, inasmuch as the thing was done in direct violation of the law. The case of *Marchant v. Evans* is precisely in point. I am of opinion, therefore, that this pamphlet having been sent out without the name of the printer, he cannot recover for the labour, or for the materials used in printing it. The rule must therefore be made absolute.

Rule absolute.

SLEAT and Others *against FAGG.*

A parcel containing country banker's notes, of the value of 1300*l.* and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice

that they would not be answerable for any parcel above 5*l.* in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, Held, notwithstanding that the carrier was responsible for the loss.

DECLARATION stated, that, in consideration that the plaintiffs, at the request of the defendant, had caused to be delivered to the defendant a parcel, containing promissory notes for payment of money, country bank notes, and other notes, of the value of 9000*l.*, and certain promissory notes by the plaintiffs, for the payment of money on demand to the bearer thereof, to be forwarded by defendant for plaintiffs, towards Christchurch, in the county of Hants, for a certain reward to defendant in that behalf, defendant undertook to forward such parcel towards Christchurch, by a certain coach called *The Pool Mail*. Breach, that defendant did not forward the parcel by the *Pool* mail, but, on the con-

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trary, caused the parcel to be sent by a certain other coach, whereby the parcel and contents were lost to plaintiff. Plea, non-assumpsit. At the trial, before Abbott C. J., at the *London* sittings after last *Hilary* term, the following appeared to be the facts of the case. The plaintiffs were bankers, resident at *Christchurch*, in the county of *Hants*, and issued promissory notes, payable at their agents' in *London*, Messrs. *Rogers, Towgood and Co.* The latter, for a considerable time, had been in the habit of sending, on the first of every month, a parcel, containing a large quantity of notes, paid by them on account of the plaintiffs during the preceding month, addressed to Mr. *Angier*, *Christchurch, Hants*, he then being the head clerk in the plaintiffs' banking house. These parcels were sent to the office of the defendant, at the *Bell and Crown, Holborn*, for the purpose of being forwarded by them to *Christchurch* by the *Post* mail, and were not insured as parcels of value. On the 1st December, 1820, *Rogers, Towgood and Co.* delivered at the office of the defendants in *Holborn*, a brown paper parcel, containing notes of the plaintiff to the amount of 1300*l.* It was addressed to "R. Angier, *Christchurch, Hants*, per mail," and the defendant's book-keeper booked it to go by the mail. It was in fact sent by a *Southampton* light coach, which went from the same office at half past four in the evening. It was the practice at the office to send all parcels addressed to *Christchurch*, which arrived at the office before that hour, by the light coach, and the defendants had so sent, for several preceding months, the parcels which had been addressed to Mr. *Angier*, and which had been directed to go by the mail. The *Southampton* light coach left the inn in *Holborn* at half past four; it stop-

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against
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ped for supper and other purposes on the road ; and at *Southampton* the parcels are taken out to be ready when the mail arrives. The mail leaves the *Bell and Crown* in *Holborn* at half past seven in the evening, and arrives at *Southampton* about twenty minutes after the light coach, and then any parcels coming by the other coach, addressed to *Christchurch*, are put into the mail, and forwarded to *Ringwood*, where such parcels are then put into a mail-cart, and conveyed to *Christchurch*. Neither of these coaches went the whole way from *London* to *Christchurch*. The price of the carriage of such parcels was the same by both coaches. It appeared that the defendant had given notice that he would not be answerable for any article exceeding 5*l.* value, if lost, stolen, or damaged, unless the article were insured ; and the plaintiffs were cognizant of that notice. Where an article was insured as a parcel of value, it was the practice in the defendant's office to place it while there in an iron chest, and upon loading the coach, to place it in the boot of the coach, with the heavy luggage over it, so as that it could not be taken out without removing the superincumbent articles. The parcel in question not having been insured as a parcel of value, was placed under the seat in the inside of the coach, and was lost. The defendant's book-keeper stated that he had always supposed the parcels sent to the plaintiffs to contain some monthly publication. On that day on which the parcel in question was lost, a person who booked himself late in the evening, in the name of *Jones*, for *Southampton*, as an inside passenger, and who was present when the coach was loading, and heard the names of the persons to whom the different parcels were addressed called over, went by the coach as far as *Farnham*, saying that he meant to sleep there, but, upon enquiry, no information

ation could afterwards be obtained there respecting him, and there was very little doubt that he was the person who had stolen the parcel. On the following morning, some of the notes, to the amount of 1050*l.*, were presented for payment at Messrs. *Rogers, Tonggood and Co.*, and paid. The defendant, *W. G. Rogers* and *C. Blayney* were the proprietors of the *Pool* mail; the defendant and two other different persons were the proprietors of the *Southampton* light coach. Upon these facts the Lord Chief Justice was of opinion, that if there had been a mail-coach travelling the whole way from *London* to *Christchurch*, the plaintiffs would have been entitled to recover; but the fact being otherwise, he left it to the jury to consider whether the risk was increased by sending the parcel by the light-coach instead of the mail; telling them, if they were of opinion that the risk of loss was increased by sending the parcel by the substituted mode of conveyance, they should then find their verdict for the plaintiffs. A verdict was found for the plaintiffs for 1050*l.* A rule nisi having been obtained in last *Michaelmas* term for a new trial, on the ground that the carrier was in this case protected by the terms of his notice, the parcel not having been insured.

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Scarlett, Marryat, and F. Pollock, now shewed cause. The defendant is not protected by his notice; for this is a case not of negligence in the course of the performing contract, but of non-performance of the contract. The defendant contracted to send by one coach, and in fact he sent by another. If a purchaser of goods directs the vendor to send them by a particular ship, and he sends them by another, and they are lost,

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the vendor would clearly be responsible. Here too, the jury have found that the risk was increased by the defendant having sent the parcel by the light coach instead of the mail. The want of notice to the carrier of the value of the parcel, might possibly have been an answer to this action, if the parcel had been sent by the *Pool* mail, and lost in the course of conveyance.

Littledale and *Parke*, contrà. No notice having been given to the defendant of the value of the parcel, he is discharged from liability by the stipulation in his notice, that he will not be answerable for any goods above a certain value unless insured. In *Batson v. Donovan* (a), it was held, that any unfair concealment of the value of the parcel by the party sending it discharges the carrier, and *Bayley* J. there says, "that the holding out as an ordinary risk, what is really an extraordinary one, is a legal fraud." In this case, the notes were inclosed in a brown paper parcel, and addressed to a clerk of the plaintiffs, for the very purpose of concealing the nature of the contents from third persons, but the defendant was thereby also deceived, and was induced to consider it as a parcel of no value, and to place it in a part of the coach where parcels of little value are usually placed. It is true, that the defendant undertook to carry this parcel by the *Pool* mail, but that special undertaking cannot vary the consequences of any breach of the contract. The defendant enters into the contract to carry by a particular conveyance, on the condition only, that the party shall deal fairly, and not commit any fraud. In *Batson v. Donovan*,

(a) 4 B. & A. 21.

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there was a mere omission on the part of the plaintiff, to give the carrier notice of the value of the parcel; here there is an additional circumstance, the parcel is addressed to a clerk of the plaintiff, for the very purpose of concealing the nature of its contents, and that was a fraud upon the defendant, and nullified the contract. In *Nicholson v. Willan* (a), the defendants, who were proprietors of a mail and heavy coach, contracted to send a parcel by the mail; it was booked for the heavy coach, and it was lost. They were held not to be liable for the loss.

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ABBOTT C. J. I am of opinion, that there is no ground for disturbing this verdict. I cannot say that the non-communication of the contents of the parcel to the carrier, and the directing of it to a clerk of the plaintiff for the purpose of concealing its contents, was such a fraud upon the carrier as to make his contract null and void. It has been held, indeed, that a plaintiff shall not be allowed to complain of a negligent performance of the contract by the carrier, where that negligence has been occasioned by the plaintiff's own act, viz. by his treating the parcel as a thing of no value. This, however, is not the case of the negligent performance of the contract, but of a refusal altogether to perform it, for the defendant did not send the parcel by the *Pool Mail* as he had contracted to do. This forms a material distinction between this case and that of *Batson v. Donovan*. Besides, in this case, the jury have expressly found, that by the substituted mode of conveyance, the property was exposed to greater risk than it would have been, had it been sent by the mode elected

(a) 5 East, 507.

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against
FACQ.~~

by the plaintiffs. For these reasons, I think that the rule for a new trial must be discharged.

BAYLEY J. In *Batson v. Donovan*, the very ground of action against the carriers was a negligent performance of their duty, and it was held, that the plaintiff in that case could not make that negligence a ground of action, because he had superinduced it by his own neglect, in not communicating the value of the parcel to the defendants. If that had been done, they would probably have placed it in a more secure part of the coach. In that case, the carriers in performance of their contract placed the parcel in the coach, and the foundation of the charge against them was mere negligence in the course of performing their contract. This is a case not merely of negligence, but of misfeazance; for the defendant received the parcel for the purpose of conveying it by the *Pool Mail*, of which he was a proprietor. He, however, divests himself of his charge, and sends it by another conveyance, of which all the same persons were not proprietors. The defendant, therefore, did not carry it in pursuance of his contract, but substituted a different carrier, and that being so, this case is governed by the decision of the Court in *Garnett v. Willan*. (a) If the defendant had sent the parcel by the mail in pursuance of his contract, I should have been of opinion, that under the circumstances of the case, he would not have been liable for the loss. But having sent it by a different mode of conveyance, I am of opinion that he is liable, and consequently, that this rule must be discharged.

(a) *Ante*, 53.

HOLROYD

HOLROYD J. I am also of opinion, that in this case there ought not to be a new trial. The question is, whether the carrier is protected from the loss in question by the terms of his notice. I think, that in cases of misfeazance a carrier is not thereby exempted from loss. This is clearly a case of misfeazance. It is not mere neglect in the course of performing the contract, but an absolute refusal by the defendant to execute the engagement entered into by him; for here he contracted to send by one conveyance, the proprietors of which would be responsible in case of loss, and he sends by another owned by different proprietors. This, therefore, is not a mere breach in the mode of performance, but is in direct contravention of his contract, and therefore a direct misfeazance. The plaintiffs in this case might have declared, that they having delivered to the defendant a parcel for a particular purpose, he, by a direct misfeazance, converted it to a different purpose, and a count in trover might have been joined. I entertained some doubts in the course of the argument, whether assumpsit was the proper form of action, on the ground, that the concealing from the defendant the value of the parcel, might be considered such a fraud on the part of the plaintiffs, as to annul the contract altogether, and then the party must have had recourse to his remedy for the misfeazance. But, upon further consideration, I am of opinion, that the contract was not rendered wholly void by that act of the plaintiffs. For it appeared that the defendant would have sent the parcel by the same coach, even if the plaintiffs had described it as a parcel of value, inasmuch as all parcels sent to the office before a certain hour, were forwarded by that coach: and, therefore, the concealment of the value was not the cause of the non-performance of the

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contract, in which respect this case is distinguishable from *Batson v. Donovan*. There the foundation of the action was, the negligence of the carriers in the course of performing the contract; here, the ground of action is an absolute refusal to perform the contract. For these reasons, I am of opinion, that the plaintiffs in this case are entitled to recover, and that the rule for a new trial must be discharged.

BEST J. I had the misfortune to differ from the rest of the court in *Batson v. Donovan*, and the opinion I delivered in that case continues unaltered. The only circumstance from which fraud is attempted to be inferred in this case, is, that the parcel was directed to Mr. Angier, (who was not the owner,) in order that it might not be known to be a banker's parcel. That, however, is not a circumstance which affords such evidence of fraud as to avoid the contract; there must be a positive fraud. Here there is a mere concealment, which does not amount to fraud. For these reasons, I am of opinion, that the plaintiffs are entitled to recover, and that the rule for a new trial must be discharged.

Rule discharged.

WRIGHT against SNELL and Others.

A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners. Goods having been sent by the carrier addressed to the order of J. S. a mere factor: Held, that the carrier had, not as against the real owner, any lien for the balance due from J. S. Query, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from J. S.

for

for the plaintiff for 58*l.*, subject to the opinion of the Court on the following case:

The plaintiff, a manufacturer of earthenware in *Staffordshire*, had forwarded by the defendants, who were carriers from thence to *London*, 80 crates of earthenware, on 20th *May*, 1820, and 20 crates on the 9th *July*, 1820, addressed to the order of *E. Robinson*, who had no interest in the goods, except as commission-agent. The charge due for carriage on the two parcels amounted to 56*l. 1s. 4d.* *Robinson* was a person who acted as agent in *London* to procure orders for goods from the plaintiff and other manufacturers in *Staffordshire*. On the 20th *May*, he was indebted to the defendants in the sum of 58*l.* for the carriage of other goods, no part of which belonged to the plaintiff. The plaintiff having applied to the defendants to deliver the goods in *London*, the latter refused to do so, without an order in writing from *Robinson*, and without being paid the whole balance due to them from *Robinson*, including the above sum of 58*l.*; and the plaintiffs, in order to obtain possession of the goods, agreed, under protest, to permit the defendants to receive the sum of 20*l.*, being the price to be paid for the goods by the purchasers in *London*. The defendants accordingly received that sum; and, after deducting the sum of 56*l. 1s. 4d.*, which was not disputed, and also the sum of 58*l.*, upon which the question arose, paid over the balance, amounting to 92*l. 8s.* to the plaintiffs. It appeared that, between *September*, 1819, and *February*, 1821, the defendants had delivered to the plaintiff a printed freight-bill, in which they stated "that all goods would be considered subject to a lien, not only for the freight of such particular goods, but also for any

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against
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general balance due from their respective owners," and subsequently to the present dispute, the defendants delivered to the plaintiff other freight bills, by which they stipulated "that all goods, from whomsoever received, or to whomsoever belonging, should be subject to a lien, not only for the freight of the particular goods, but also for any general balance that may be due from the person to whom they are consigned or addressed."

Campbell, for the plaintiff, was stopped by the Court.

Chitty, for the defendants. By the terms of the freight note, "all goods are to be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners." The goods here were consigned to *Robinson's* order; he therefore, although in reality a factor, had the apparent ownership with the consent of the true owner. Now, if an agent be permitted to deal as if he were a principal, the party dealing with him, and ignorant of his representative character, is entitled to the same right against him as if he were in fact the principal. Thus he may set off against a demand from the principal, a debt due from the factor to himself. *George v. Claggett.* (a.)

ABBOTT C. J. Where goods are consigned to *A. B.* or order, the carrier has a right to consider *A. B.* as the owner of the goods for the purpose of delivery, but not for the collateral purpose of creating a lien on the goods, as against the owner, in respect of a general

(a) 7 T. R. 359.

balance

balance due from the consignee; nor will any prejudice arise to the carrier from our holding this to be the law, for he need not deliver the goods in any case till the price of the carriage for them is paid. I think, therefore, that in this case, the defendants had no lien for the sum of 58*l.*, and that the plaintiff is entitled to our judgment.

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BAYLEY J. The foundation of the lien claimed, is that the carriers had given notice that all goods should be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from the respective owners. Now, perhaps, as between the real owner of the goods and the carriers, that may be a binding bargain; the real owner however in this case is not *Robinson*, the consignee, from whom the debt is due—the defendants, but the plaintiff, who is a perfect stranger to that debt. It has been argued, that the carrier was induced to believe *Robinson* to be the real owner by the act of the plaintiff, who had consigned the goods to the order of *Robinson*. In the ordinary course of trade, however, goods are consigned to a man, either on his own account, or in the character of factor. There was nothing in the manner in which these goods were consigned to *Robinson* to induce the carrier to believe that they were consigned to him on his own account, and as his own property, rather than in his character of factor; and if they were consigned to him in that character, it would be most unjust to allow the carrier this lien. For it would follow, that if goods to the amount of 5000*l.*, the carriage of which amounted to 10*l.* only, be sent to a factor, he at that time being indebted to the carrier in 1000*l.*, the latter

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and
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would have a right to keep those goods until he were paid the whole sum due to him from the factor. That would however be most unjust, and, in my opinion, contrary to law.

HOLROYD J. I am of opinion, that the mere act of consigning goods to another cannot give to a third person any right to retain the goods of the consignor until the payment of the debt of the consignee. The case of *George v. Claggett* differs materially from the present; there the goods were consigned to a factor, who carried on business also on his own account, and he sold, acting under the authority given to him, but in his own name; and it was held that the purchaser of the goods had a right to set off, in an action brought by the principal, the debt due from the factor. It is clear, that the mere possession of the factor does not give him a title to deal with the goods beyond the authority given to him: he may sell, but he cannot pledge. Now, if he could not pledge these goods to the carrier, as a security for his debt, by any subsequent agreement, how can he do it in this case, in consequence of any prior express or implied agreement. I am of opinion, that he cannot, by any agreement, either express, or implied from his course of dealing, subject the property of his consignor and employer to the payment of his own debts: nor can he authorise these defendants to retain the goods as a pledge and security for the money owing by him.

BEST J. I am of the same opinion. The cases in which a party, dealing with a factor who does not, at the time of sale, disclose the name of his principal, has been allowed to set off a debt due to him from the factor, in

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an action brought by the principal, do not apply to the present question. Those cases proceeded on the ground, that the owner of the goods had allowed the factor to assume the character of owner, and thereby induced others to advance him money. That doctrine has no application to this case, because carriers are not in the habit of advancing money to the consignees of goods. They have it in their power to exact payment upon their delivery. But even supposing that these goods, instead of being addressed to a factor, had been addressed to the real purchaser, the carrier would have no right to say, if the bargain was rescinded, either from the inability of the purchaser to pay, or his refusal to complete the bargain, that the original owner of the goods should not have them back without paying all that might be due from the proposed vendee. I should doubt, if any form of words would be sufficient to establish a liability of that sort. It is, however, sufficient, in this case, to say, that the plaintiff is the owner of the goods, and there being nothing due from him to the carriers, the words of the notice do not impose any liability upon him. If any question should arise that falls within the terms of the notice last given, it would be very fit to consider whether a carrier can make so unjust a regulation as is there attempted. For the reasons already given, I am of opinion that the plaintiff is entitled to the judgment of the Court.

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against
SNELL.

Judgment for the plaintiff.

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MAINWARING, Baronet, *against GILES.*

An action at common law will not lie for disturbing another in the possession of a pew, unless the pew be annexed to a house in the parish.

DECLARATION stated, that the plaintiff, before and at the time, &c. was and thence, until, &c. had been, and still was lawfully possessed of a certain messuage, with the appurtenances, situate in the parish of *Rosthern*, in the county palatine of *Chester*, and therein, during all the time aforesaid, inhabited, and still did inhabit with his family, and by reason thereof, until, &c. of right ought to have had, for himself and his family inhabiting in the said messuage, with the appurtenances, the use and benefit of a certain pew in the parochial chapel of *Over Peover*, situate in the parish aforesaid, to hear and attend divine service celebrated therein, as to the said messuage appertaining. And that defendant disturbed him in the enjoyment of the pew. Whereby, &c. In the second count, the plaintiff, after alleging his possession, &c. as in the first count, claimed the right, privilege, and liberty of sitting in the pew, as to the messuage belonging and appertaining yet, &c. The third count stated, that the said plaintiff, before and at the time, &c. was and thence until, &c. continued, and still was lawfully possessed and entitled to the use and benefit of a certain other pew in a certain chapel, in the parish and county aforesaid, to hear and attend divine service celebrated therein, yet, &c. Plea the general issue. The cause was tried at the last Summer assizes for the county of *Chester*. The plaintiff gave in evidence an instrument under the seal of the chancellor of the diocese of *Chester*, by which,

after

after reciting that there was a certain cause or business of assigning and confirming the taking down and rebuilding the chapel of *Over Peover*, in the county and diocese of *Chester*, with a gallery, and with convenient pews or seats, as well in the body of the said chapel, as in the said gallery; and that, at a vestry meeting held *April* 19th, 1812, pursuant to public notice, it was unanimously resolved by the persons present, that three individuals be appointed to allot and appropriate the several pews or seats in the body of the said chapel, and also in the gallery, to and amongst such of the inhabitants or land-owners within the said chapelry, who had, or should subscribe towards defraying the expences of the said gallery and new pews; the bishop decreed a faculty commission and authority to the individuals so appointed by the vestry, and assigned and confirmed unto them, to allot and appropriate the several pews or seats in the body of the said chapel, and also in the said gallery, to and amongst such of the inhabitants or land-owners within the said chapelry, who had, or should subscribe towards defraying the expences of the said gallery and new pews; the right and jurisdiction of the ordinary, nevertheless, in the said gallery, and also in the pews or seats therein, and the power to approve or disapprove of the future disposition thereof, as from time to time shall to him seem expedient, being at all times saved and reserved. The plaintiff then gave in evidence an award made by the three commissioners, in which one pew was allotted to the plaintiff, expressly in respect of the mansion house in his own occupation, and four other pews, including the pew in question, were also allotted to the plaintiff, but without specifying any particular messuages, in respect of which they were so allotted,

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allotted. The plaintiff was proved to be the owner of other farms in the township, in addition to the lands belonging to the mansion-house in which he resided. The disturbance of the right was fully proved, and the jury found a general verdict for the plaintiff, damages 10*l.*

D. F. Jones, in last *Michaelmas* term, obtained a rule nisi for a new trial, on the ground, that the document, as given in evidence, was in fact merely a commission for the purpose of informing the conscience of the bishop, with a view to his subsequently granting different faculties for the several pews, and was not itself a faculty. This instrument only delegated a right to the commissioners of allotting conditionally the pews to different persons, reserving expressly the right of approval, and of subsequently disposing of the seats to the ordinary; now a faculty should at once have allotted to the plaintiff the pew in question.

But even supposing the document to be a faculty, it was invalid, for the allotments were to be in respect of subscriptions towards the repairs of the chapel, instead of being in respect of the inhabitancy of messuages within the township. (a) It should, also, to be valid, have specified the particular messuage to which the pew was annexed. *Rogers v. Brooks.* (b) Nor could the award be coupled with it, for it did not appear that the bishop had ever approved of such award. Besides, even supposing it could be so coupled, still it did not allot the pew in respect of any particular messuage, of which the grantee was the inhabitant. *Stocks v. Booth.* (c) In the third place the plaintiff ought to have proved, upon the

(a) 1 *Burn. Eccles. Law*, 360. (b) 1 *T. R.* 431. (c) 1 *T. R.* 428
trial,

trial, the fact of his being the occupier of a particular messuage, and to have connected the pew with that messuage. And he cited *Watson's Clergyman's Law*, p. 39. *May v. Gilbert* (a), *Brabin v. Tradum* (b), *Gibson's Codex*, 197, 8., *Kenrick v. Taylor* (c), *Griffith v. Matthews* (d), *Stocks v. Booth* (e), 1 *Burn's Ecclesiastical Law*, 333, *Corven's Case* (f), *Langley v. Chute*. (g)

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Parke now shewed cause. The original grantee of a pew under a faculty may maintain an action at common law for disturbance, although the pew be not in the grant annexed to a house. In *Pettman v. Bridger* (h), it was held, that a possessory right in a pew was sufficient to maintain a suit in an ecclesiastical court against a mere disturber. Sir John Nicholl, in delivering the judgment of the Court in that case says, "The fact of possession implies either the actual or virtual authority of those having power to place. The disturber must shew that he has been placed there by this authority, or must justify his disturbance by shewing a right paramount to the ordinary itself; namely, a faculty by which the ordinary has parted with the right; or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty. It is necessary, in case of prescription, to shew, that the use and occupation of the seat have been from time immemorial appurtenant to a certain messuage." In this case the pew was allotted to the plaintiff in 1812, by the award made by virtue of the faculty. In *Watson's Clergyman's Law*,

(a) 2 *Evid.* 150.(e) 1 *T. R.* 498.(b) *Popham*, 140.(f) 12 *Co.* 105.(c) 1 *Wils.* 326.(g) Sir T. *Raym.* 246.(d) 5 *T. R.* 296.(h) 1 *Philips. Rep.* 324.

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p. 298, it is said, “prescriptions to have seats, as belonging to houses, are not reasonable; for, first, it has been adjudged, that if an ordinary make a grant of a seat to one and his heirs, it is not good, and the reason given is, that a seat cannot belong to a person but to a house; for otherwise, when a person goes out of a town to dwell in another place, yet he shall retain the seat, which is unreasonable;” and *Brabin v. Tradim* (*a*) is cited. He then proceeds to say, “And if the ordinary may not make a grant of a seat to a person and his heirs, I see not how he can make such grant to bind posterity, for he cannot make a grant to a house not things but persons only being capable of grants;” and *Haines’ case*, 12 Coke, 113 is cited. It appears, therefore, to have been the opinion of that learned writer, that the original grant of a pew could only be to a person, and not to a person in respect of a house. In *Kenrick v. Taylor* (*b*) it was held, in an action for disturbing the plaintiff in his pew, that it was not necessary, as against a stranger, to prove that he had repaired it. [*Best J.* In that case the pew was alleged to be annexed to the plaintiff’s house, and, consequently, the disturbing of him in his enjoyment of his pew constituted a temporal injury in respect of an easement which he had in virtue of his house. It may be very fit that, for the purpose of preserving decency and decorum in places of worship, there should be a remedy in ecclesiastical courts for disturbance in such a case; but can any action be maintained at common law, except in respect of the temporal injury arising from the disturbance of a right to a pew where it is annexed to a house?

(*a*) *Popham*, 140, & 2 *Rolls Abr.* 287. n. 7.(*b*) 1 *Wils.* 326.*Abbott*

Abbott C. J. In no case has a person a right to the possession of a pew analogous to the right which he has to his house or land; for trespass would lie for an injury to the latter, but for an intrusion into the former, the remedy undoubtedly is by an action on the case. That furnishes strong reason for thinking that the action is maintainable only on the ground of the pew being annexed to the house as an easement, because an action on the case is the proper form of remedy for the disturbance of the enjoyment of any easement annexed to land, as in the case of a right of way or a stream of water.] The reason why trespass does not lie against a wrong doer for an injury done to the pew of another is, that the freehold is in the parson. A faculty for a pew can only be to the grantee, and the pew cannot be enjoyed in respect of a particular messuage. The ordinary has the disposal of the seats of the church, and he may from time to time apportion them according to the circumstances of the parish. In *Brownlow* and *Goldesbrough's Reports*, 45, it is laid down by Lord Coke, that a pew cannot belong to a house.

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D. F. Jones, contra, was stopped by the Court.

ABBOTT C. J. Without giving any opinion whether the instrument given in evidence be a valid instrument or not, I am of opinion, that this being a pew in the body of the church, and not in a chancel, which might be the freehold of an individual, no action at common law can be maintained for a disturbance; because the pew is not annexed to any house. The disturbance is matter for ecclesiastical censure only. The rule for a new trial must therefore be made absolute.

BAYLEY J.

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BAYLEY J. I am of the same opinion. We leave the question untouched as to any right which the party may have in the ecclesiastical court. We only decide, that we cannot, in a court of common law, interfere in such a case as this, unless by the faculty the pew be annexed to a house in the parish.

HOLROYD J. Where a right is annexed to a house in the parish, an obstruction to that right is a detriment to the occupation of the house, and I apprehend, that it is only on account of the pew being annexed to a house, that the temporal courts can take cognizance of any intrusion into it. Inasmuch, therefore, as the pew is not in this case annexed to a house, this is as much a matter of ecclesiastical cognizance alone, as the question which was discussed in this court as to the right of burying the dead in iron coffins. I am of opinion, that the mere right to sit in a particular pew is not such a temporal right as that, in respect of it, an action at common law is maintainable.

BEST J. concurred.

Rule absolute.

**JOHN DOE on the Demise of CHARLES Earl of
SHREWSBURY against WILSON, Esq.**

EJECTMENT to recover lands in the county of *Stafford*. The cause was tried at the Summer Assizes, 1820, for the county of *Stafford*, before *Best, J.*, when

By a private act, passed in the year 1720, certain estates were settled in strict settle-

tlement, and a power was reserved to the respective tenants in tail, by deed, to lease any part of the lands thereby settled, "for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon every such lease there be reserved, and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same; and so as there be contained therein a condition of re-entry for non payment of the said rent, and rents thereby to be reserved." By lease, dated the 6th January, 1785, a tenant in tail of the said estates demised a part of the premises thereby, settled to hold from the date of the lease for ninety-nine years, if three persons therein named should so long live, yielding and paying yearly and every year during the said term, unto the lessor, the yearly rent of 50*s.* upon the 25th March and 29th September, by even and equal portions, the first payment to be made on the 25th March ensuing the date of the lease. There was a proviso that, if the rent should not be paid on those days, or if certain amercements and fines therein mentioned, after reasonable demand, should not be paid, it should be lawful for the lessor, his heirs, and assigns, to re-enter and distrain, and the distress to take away, detain, and keep, until the rent be satisfied; and there was the following proviso for re-entry: "that in case the said yearly rent should be unpaid for the space of twenty eight days after it became due, being lawfully demanded, it should be lawful for the lessor, his heirs, and assigns, to re-enter."

Previous to the time of passing the act, the premises demised by this lease had been demised jointly with other premises by the settlor's ancestor, by a lease bearing date 2d February, 1708, "for ninety-nine years, determinable upon three lives, at a yearly rent of 32*s.* payable on the same days as those mentioned in the lease of the 6th January, 1785, and the first payment to commence on the 25th March ensuing the date of the lease." It contained also a similar power for the lessor to distrain, and a power of re-entry, upon the rent being behind for twenty-eight days, upon its being lawfully demanded, and not paid, and no sufficient distress being found upon the premises. It did not appear whether any other lease was granted between that period and the year 1756. At that time another lease of the premises, demised by the lease of the 6th January, 1785, was granted at a rent of 32*s.* payable at the same period as in the other leases, containing the same powers of distress and re-entry for non-payment of rent as those in the lease of the 6th January, 1785:

Held, first, that it was not a valid objection to the lease of the 6th January, 1785, that the rent was made payable on the 25th March and the 29th September, (although the term commenced on the 6th January, and therefore there was a forehand rent, which might prejudice the remainder-man) inasmuch as the rent was made payable on the same days by the former lease, and, therefore, this was the usual and accustomed rent:

Held, secondly, for the same reason, that it was no objection to the lease that the rent was made payable by half-yearly payments, although the power required it to be payable yearly; the word *yearly* meaning a payment of rent in the year:

Held, thirdly, that it was no objection to the lease that by the terms of it the landlord could distrain only after a reasonable demand, and that he was bound to detain the distress until the distress be satisfied; for this being a clause introduced for his benefit, he was not thereby abridged of any right of distress which he had by common law, or of sale, under the statute 4 & 5 W. & M.:

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Held, fourthly, that it was no objection to this lease that the clause of re-entry reserved the right of entry to the landlord upon the rent being twenty-eight days in arrear, for this was a reasonable condition of re-entry, and was conformable to the old lease. Nor was it any objection that the right of re-entry was made to depend upon the rents being lawfully demanded, for the landlord was not thereby deprived of the benefit of the 4 G. 2. c. 28. and consequently was entitled by that statute to enter without making any demand:

Held, also, that part of premises formerly demised, jointly with others, at one entire rent, might be let under the terms of this power, at a rent bearing the same proportion to the old rent that the premises demised by the lease bore to the whole premises formerly demised.

signed

the jury found a verdict for the lessor of the plaintiff, subject to the opinion of the Court on the following case:

In the year A.D. 1720, a private act of parliament passed for annexing the Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement. By this act certain lands and hereditaments, of which the premises mentioned in the declaration were parcel, were settled to the use of George Talbot, brother of Gilbert then Earl of Shrewsbury, for life, remainder to trustees to preserve, &c. And after the decease of the said George Talbot, to the use of trustees for the term of 200 years, to secure the jointure of Mary Fitzwilliam his wife, and after the determination of the said term, to the use of the first and other sons of the said George Talbot, on the body of the said Mary Fitzwilliam to be begotten, in tail male successively, with remainders over, and with an ultimate remainder to the use of all persons being issue male of the body of John first Earl of Shrewsbury, to whom the title, honour, and dignity of Earl of Shrewsbury should, by virtue of the letters patent of the creation of the said earldom descend, in tail male, to attend and wait upon the said earldom, and to be annexed to and descend with the same. The act contained a restriction from alienation, except on certain conditions therein specified, and the following power of leasing; "that it shall and may be lawful to and for the successive tenants in tail, and every other person and persons to whom the said manors, lands, &c. are limited by this act of parliament successively, by any deed or deeds, writing or writings by them respectively to be

signed in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors, lands, &c., and premises, whereof the person making such lease shall be actually possessed, except the capital messuage, gardens, and park of *Heathcote*, in the county of *Oxford*, to any person or persons, in possession, and not in reversion, for the term of three lives, or twenty-one years, or for any term or number of years, determinable upon the death or determination of three lives, *so as upon all and every such lease and leases, there be reserved and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same, and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent and rents thereby to be reserved,* and so as the lessee and lessor, to whom such lease and leases shall be made, do seal and execute counterparts of such lease and leases."

On the 6th day of *January*, 1785, *George*, then Earl of *Shrewsbury*, the eldest son and heir of the said *George Talbot*, by *Mary Fitzwilliam*, his wife, was seised in tail male of the said settled estates, under the said act of parliament, and being so seised, signed, and executed in the presence of two credible witnesses, an indenture of lease of that date, comprising the premises in the declaration mentioned, by which in consideration of the surrender and delivery up of one indenture of lease of the premises thereby demised, bearing date the 13th of *January*, 1756, granted by the said earl to *Thomas Patten*, for the lives of three persons therein mentioned, two of whom were since dead; and also in consideration of the sum of 105*l.*, paid by *T. Patten*, the lessee, for adding two lives, for and in

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the name of a fine or income, he the said earl demised, granted, leased, &c., set and to farm let unto the said T. Patten, all those wire-mills, new erections, and buildings, called or known by the name or names of *Alton Mills*, upon the river *Churnett*, &c., situate in *Alton*, in the county of *Stafford*, &c., to have and to hold, from the day of the date of the indenture, for the term of ninety-nine years, if three persons therein mentioned should so long live, yielding and paying, therefore, yearly and every year, during the said term thereby granted, unto the said earl, his heirs and assigns, the yearly rent or sum of 50*l*. at and upon the two usual feast-days and terms in the year, called the feast-day of the annunciation of the blessed virgin *Mary*, and the feast-day of *St. Michael*, the archangel, by even and equal portions, clear over and above all manner of taxations, impositions, and payments, of what nature or kind soever, the first payment thereof to begin and be made on the feast-day of the annunciation of the blessed virgin *Mary* next ensuing the date thereof. There then followed covenants on the part of the lessee for payment of rent, and for repairing the premises, and converting the mills, which had formerly been used as water corn-mills, into the same condition as they were before they were converted into wire-mills, and for doing suit of court to the court holden for the manor of *Alton*, and to obey, perform, accomplish, and pay all ordinances, pains, fines, and amerciaments, made and set from time to time in the said court, by the stewards, homages, or afferors there; and that in case the mills, &c., or kiln-house, &c., should remain out of reparation for three months after warning or notice, &c., or if the said suit of court should

not

not be done, then the lessee should pay to the lessor for every such time the premises were out of reparation for the space of three months, the sum of 20*s.* sterling, in nomine poense; and for every time as the said suit of court should not be done, the sum of 20*s.* in nomine poense. The lease then contained the following power of distress and proviso for re-entry. "And if it shall happen the said yearly rent shall not be paid at the days and times aforesaid, or if the said amercements, pains, fines, and penalties, nomine poense, after reasonable demand in that respect made, be not paid and satisfied according to the true intent and meaning of this indenture, then from time to time it shall and may be lawful to and for the said Earl, his heirs and assigns, into the said demised premises, to re-enter and distrain, and the distress and distresses to take, lead, drive, and carry away, detain and keep, until they or some of them be fully satisfied, contented, and paid. Provided always then, that in case it shall happen the said yearly rent, or any part thereof, shall be behind or unpaid by the space of twenty-eight days next after any or either of the respective feast-days and times whereon the same ought to be paid, as aforesaid, *being lawfully demanded*, that it shall be lawful to and for the said Earl, his heirs and assigns, into all and singular the said demised premises, or into any part thereof, in the name of the whole, wholly to re-enter, and the same to have again, repossess, and re-enjoy, as in his and their former estate; any thing herein contained to the contrary thereof in anywise notwithstanding." Covenant by the lessor for quiet enjoyment, &c.

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The premises mentioned in the declaration and
B b 2 demised

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demised by the above lease were, with other premises, demised by a former indenture of lease, dated *February 2d, 1708*, by the *Duke of Shrewsbury*, in consideration of a sum of *200L*, habendum to the lessee from the date thereof, for ninety-nine years, if three persons therein named should so long live, yielding and paying therefore, yearly and in every year, during the said term thereby letten, unto the duke, his heirs and assigns, the yearly rent of *82L*, at the two usual feast days of the year, called the feast day of the Annunciation of the blessed Virgin Mary, and the feast of St. Michael the Archangel, by even and equal portions clear over and above all manner of taxations, impositions, and payments whatsoever, the first payment to be made on the *25th March* then next ensuing. The lease contained covenants similar to those in the lease of *1785*, for the payment of rent, repairs, &c., and to do suit of court, &c., and to pay all fines and amerciaments made from time to time in the court; and that if the premises should be out of reparation for three months after notice, or if the suit of court should not be done, that the lessee should pay, for every time the premises were so unrepaired for the space of three months, the sum of *20s.*, in nomine poenæ, and for every time the suit of court should not be done, the sum of *10s.*, in nomine poenæ. There then followed a power to destain in precisely the same terms as those used in the lease of *1785*. The proviso for re-entry differed from that in the lease of *1785*, in this respect, that the right to re-enter was made to depend "upon the rent being in arrear for the space of twenty-eight days, and upon its being lawfully demanded and not paid, and no sufficient distress being found upon the premises whereby the rent might be satisfied."

satisfied." There was reserved a liberty to the lessee to exchange lives, and a stipulation, as to what was to be done, if the lives should drop in the first ten years.

The indenture of lease of the 13th *January*, 1756, (mentioned in that of the 6th of *January*, 1785,) granted by *George Earl of Shrewsbury* to *Thomas Patten*, of the same premises as were demised by the indenture of lease of the 6th of *January*, 1785, and on the surrender and delivery up of which the lease of the 6th *January*, 1785, was executed by the said *George*, then Earl of *Shrewsbury*, was granted in consideration of a certain fine therein mentioned, and reserved an annual rent of 32*l.* 10*s.*, payable at *Lady-day* and *Michaelmas* in every year, in like manner as the leases of the 2d *February*, 1708, and the 6th *January*, 1785, and contained the same powers of distress and re-entry for the non-payment of rent as the said lease of the 6th *January*, 1785, contained. None of the other leases of the premises, (if any,) nor any counterpart or copies of such leases had been preserved. *T. Patten*, the lessee to whom the lease of the 6th of *January*, 1785, was made, upon the making thereof sealed and executed a counterpart of such lease. *George Earl of Shrewsbury* died on the 21st of *July*, 1787; *Charles*, Earl of *Shrewsbury*, the lessor of the plaintiff, was the heir male of *George Talbot* and *Mary Fitzwilliam*, who were his grandfather and grandmother; and succeeded to the said earldom, and the settled estates, on the death of *George Earl of Shrewsbury*. The defendant, at the commencement of this action, was in possession of the premises in the declaration mentioned, and claimed to be entitled to hold

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the same under the lease of the 6th January, 1785. The defendant was served with a regular half-year's notice to quit the premises, which notice expired before the day of the demise laid in the declaration.

Campbell for the plaintiff. The question is, whether the lease granted by George Earl of Shrewsbury was a valid execution of the leasing power contained in the act of parliament. That power must be construed according to the intention of the settlor. His great object seems to have been, that there should always be an adequate fortune to support the title. The first objection to the lease is, that it reserves a forehand rent, and therefore is in fraud of the power. The lease is dated the 6th of January 1785, habendum from the date of the lease, with the reservation of 50*l.* rent, payable half-yearly on the 25th of March and the 29th of September, the first payment to be made on the 25th March following the date of the lease. Now, the power expressly requires, that there shall be made payable yearly, during the continuance of the lease, the usual and accustomed yearly rents. This rent is not payable during the continuance of the lease, for rent is part of the produce of the land, and can only be payable in respect of the occupation of the premises. If any thing is to be paid before the occupation, it is not rent, but rather in the nature of a fine; here the first payment being to take place on the 25th March, six months' rent is payable for an occupation of two months and nineteen days, and at the end of the term there will be three months and seven days for which no rent will be payable, because the last rent is payable on the 29th September. This may materially injure the remainder man, for if the title were to descend

descend upon him on the 30th *September* in the last year of the term, he would not be entitled to any rent or any advantage from the land between that day and the expiration of the term on the 6th *January* following. It is therefore a violation of the power, for the rent is not payable during the continuance of the lease. If this be a good execution of the power, the whole of the settled property might be leased, reserving the year's rent the first day of the year, and the remainder-man might be a year short of one day without any thing to support the title. In *Regina v. Weston* (*a*), it is said by *Powell J.*, that if a man has a power to make leases, reserving the ancient yearly rent annually, yet if it was reserved upon a day before the year was up, as if the year ended at *Christmas*, and it was reserved at *Michaelmas*, it would be well, pursuant to the power, to which *Holt C. J.* is reported to have agreed. That, however, was a mere obiter dictum in a sessions' case, and is not an authority entitled to any great weight. In *Sugden on Powers*, 609, and 613, this subject is discussed, and the case of *Doe dem. Wilmet v. Giffard* is cited in support of the contrary doctrine. It appears from the brief held by the late Sir *Vicary Gibb*, then Attorney-General, that that was an ejectment brought to recover possession of *Lansdowne*-house, and tried before Lord *Ellenborough C. J.* at the *Middlesex* sittings after *Hilary* term 1810. The question was, whether a lease for twenty-one years, granted by the late Marquis of *Lansdowne*, of the premises in question to *Miss Giffard* was valid. The premises had been settled to various uses by a deed which con-

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(*a*) 2 *Ld. Raymond*, 1196.

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against
Wincor.

tained the following power of leasing: "That it shall be lawful for the Marquis of *Lansdowne*, (the maker of the power) the Earl of *Wycombe*, and Lord *Henry Petty* respectively, when, and as they shall be severally in possession of the aforesaid lands, premises, &c. by indenture, &c. to demise, lease, or grant any part of the lands and premises hereinbefore granted, of which they shall respectively be in possession, for any term or number of years absolutely not exceeding twenty-one years, so as such leases respectively be made to take effect in possession, and not in reversion; and so as there be reserved, in and by such leases, demises, or grants respectively, *the best and most approved yearly rent*, to be incident to the reversion of the said premises, that can be reasonably had or gotten for the same, without any fine, premium, or foregift, or any thing in the nature of a fine being made or taken thereof." The lease was dated the 14th *September*, 1809, and it was made by the Earl of *Wycombe*, then Marquis of *Lansdowne*, of the one part, and Miss *Giffard* of the other, and the premises in question were demised to Miss *Giffard* for the term of twenty-one years *from the day of the date* of the lease, at a rent of 1200*l.*, payable by two even half-yearly payments, on the 29th day of *September* and the 25th day of *March* in every year during the continuance of the demise, the first payment to be made on the 25th day of *March* then next. An objection was made, that inasmuch as the rent was made payable on the 25th *March* and the 29th *September*, and the term of the lease would expire on the 14th *September*, there would be no rent payable under it from the 25th *March* preceding the expiration of the term; and on that ground Lord *Ellenborough* C. J. was of opinion, that the lease was void, and the

lessor

lessee of the plaintiff recovered. In fact, there the remainder-man was prejudiced, for if his title accrued on the 26th *March*, a period from that day to the 14th *September* would elapse in which no rent would be payable. No sound distinction can be taken between that case and the present, for in this case there is a similar period, from the 29th *September* to the 6th *January*, during which no rent would be payable. *Isherwood v. Oldknow* (a) is distinguishable from this, because there the habendum was from a prior period, and the payment of rent was co-extensive with the lease, and the judgment of Lord *Ellenborough* proceeds on the ground, that the remainder man could not by any possibility be deprived of any portion of his interest. The old leases set out in the case cannot vary the construction of the power, for, according to the law as laid down in *Iggulden v. May* (b), extraneous evidence cannot be received to explain a power which is not ambiguous. At all events, there is no reference in the power except to pre-existing leases; there is no reference to any act to be done after the making of the power, and it is clear, that no inference therefore can be drawn from the lease by *George E. of Shrewsbury* in 1756, the settlement under the act of parliament having taken place in 1720. The lease of 1708 can be admitted only for the purpose of seeing what the premises were, and what was the ancient and accustomed rent, but not for the purpose of looking at the reservation of the rent, because there is nothing equivocal in the words of the power upon that subject. In *Smith v. Doe dem. The E. of Jersey*, (c), in error, leases in existence at

1892.
Doe, doce,
Earl of
Shrewsbury
against
W. J. Taylor.

(a) 3 M. & S. 382. (b) 7 East, 237. (c) 2 Brod. & B. 445.

1822.

Doe dem.
Earl of
Suffolk
against
Wilkes.

the time the power was created, were held to be admissible for the purpose of shewing how the rent was to be reserved, or rather to shew what was a reasonable power of re-entry. The question in that case was, whether the rents were equally beneficial, and, in order to ascertain that, the former leases were received to shew what construction was to be put upon the words in the power, "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved;" and they were held to be admissible, on the ground that there was an ambiguity in the power. Here there is no ambiguity whatever in the words of the power. There too, the lease was granted by the maker of the power, but that is not so in this case. The former leases, indeed, cannot afford any inference, that the maker of the power or the legislature meant that the future leases should reserve a rent in the same manner, and payable at the same period. The settlor probably saw the inconvenience likely to arise from the old form of lease, and cautiously guarded against their being made for the future, as they had been before. This objection could not have been made, as has been suggested in *Smith v. Doe dem. E. of Jersey*, because in that case there was a covenant in the lease to pay a proportionable part of the rent that might accrue due between the last quarter day and the expiration of the lease.

The second objection to this lease is, that the power requires, that the rent shall be made payable *yearly* during the continuance thereof, and it is made payable only half yearly. If the words of the power had been merely "the yearly rent," this objection could not prevail, but the power requires, not only that there shall be a *yearly rent*, but that it shall be *payable yearly*.

Now,

Now, if the power absolutely requires a yearly reservation, it has not been duly executed. *Gilbert on Rents*, p. 50. is an authority to shew, that if there be a lease reserving a rent of 50*l.* yearly, that must be a rent at the end of the year. And if there were an agreement for a lease at a yearly rent, payable yearly, there can be no doubt that a court of equity would compel the execution of a lease, making the rent payable at the end of the year. Here too, there may be a prejudice to the remainder man, for if the lessor dies during the second half year, the remainder-man will lose his half year's rent, and there can be no apportionment in such a case, for the statute 11 G. 2. c. 19., applies to cases where the lessor dies in the middle of the quarter. The fourth resolution in Lord Mountjoy's case (a) is an authority to shew, that a reservation of rent at two days, where the rent was before reserved and payable at four days, makes the lease void. In *The Dean and Chapter of Worcester's case (b)*, the question turned upon the validity of a lease granted under the 18th Elizabeth, c. 10., which gives a power to ecclesiastical persons to grant leases, whereupon the accustomed yearly rent or more shall be reserved. There the rent reserved had formerly been payable quarterly, and it was made payable half yearly. The statute which created the power, did not say that the rent should be payable yearly, but only that the accustomed yearly rent should be reserved, and there the Court are reported to have said, "It is sufficient if the accustomed rent be reserved yearly at one time," for the words of the act are, "whereupon the accustomed

1822.

Dor. dem.
Earl of
Shrewsbury
against
Wilson.

(a) 5 Rep. p. 4.

(b) 6 Rep. 37.

yearly

1822.

Dor dem.
Earl of
Sandwich
against
Wilson.

yearly rent or more shall be reserved, and therefore, if the rent be yearly reserved, the statute is satisfied by reason of the word yearly." Now here, there are the words *payable* yearly. It may therefore be fairly inferred, that if the rent had been not only reserved, but made *payable yearly*, it would have been held a good objection. In *Campbell v. Leach* (*a*), the power required only that there should be reserved the best, and most approved yearly rent. The objection was, that the rent was made payable quarterly instead of yearly, to which it was answered, that the power was silent in that respect, and only required a yearly rent to be reserved. In *The Earl of Cardigan v. Montague*, reported in the *Appendix to Sugden on Powers*, p. 690, the power very nearly resembled the power in this case, but this objection was never taken, and therefore that case cannot be considered as any authority.

The third objection is, that this lease restrains the power of distraining, and takes away the power of sale. In *Taylor dem. Atkyns v. Horde* (*b*), Lord Mansfield says, "It is not sufficient that the ancient rent be reserved, it must be reserved with all the beneficial circumstances." For that purpose the remainder-man should have reserved to him all the rights given to him by common and by statute law to satisfy himself for the rents in arrear. By common law he might distrain as soon as the rent was due; and by stat. 5 W. & M. c. 5. s. 2. he might sell the distress. By the terms of the lease the lessor can only enter to distrain after a reasonable demand in that respect, and when he has entered, &c. he cannot sell the property distrained; but he is

(*a*) *Ambler*, 740.

(*b*) 1 *Burr.* 121.

allowed

allowed only to detain the distress as a security, as he might have done before the statute of the 4 and 5 W. & M. This covenant must be construed for the benefit both of the lessee and lessor. In return for some extraordinary powers of distress, which the lessor would not otherwise have had, he must be taken to have renounced others which the law would otherwise have given him, and to have restrained himself to the acts which are here enumerated and defined.

The fourth objection arises upon the proviso for re-entry. The words of the power are, " So as in every such lease there be a condition of re-entry for non-payment of rent and rents thereby to be reserved ;" and by the lease the right of re-entry is postponed for twenty-eight days. An inconvenience not before adverted to, from allowing an interval between the day the rent becomes due and the day of re-entry, is, that in this way the remainder-man is deprived of all possibility of recovering rent from the last quarter-day to the day when his right of re-entry accrued. In ejectment, he must lay the demise after the twenty-eight days are expired ; he, therefore, cannot recover rent during the interval in an action for mesne profits ; he cannot bring covenant on the lease, for the lease has expired, and the forfeiture has reference back to the period of re-entry ; nor will use and occupation lie, the holding being under a demise by deed. This case is distinguishable from *Smith v. Doe dem. E. of Jersey*, on the ground, that here a demand is required ; for the words are, " being lawfully demanded." That imposes an unreasonable restriction on the right of entry, and deprives the remainder-man of the benefit of the statute 4 G. 2. c. 28. *Coxe v. Day* (a) is an auth-

1822.

Dox dem.
Earl of
SHREWSBURY
against
WILSON.

1822.

~~Doe dem.
Earl of
Shrewsbury
against
Wilson.~~

rity in point, and, in the opinion given by *Best J.*, in *Smith v. Doe dem. Earl of Jersey* (*a*), in the House of Lords, that learned Judge says, "Such a proviso could not be sufficient under such a power." It is true that, in *Doe dem. Scholfield v. Alexander* (*b*), it was held by the majority of the Court, Lord *Ellenborough C.J.* dissenting, that where a lease, granted since the stat. 4 G. 2. c. 28., contained a power of re-entry upon the rent being unpaid for twenty-one days, the same being lawfully demanded, no demand was necessary. It is to be observed, however, that the statute 4 G. 2. c. 28., only places the subject in precisely the same situation in which the king was before the statute. Before the statute, if the king granted a lease, with a power of re-entry, it was considered beneath his dignity to demand rent on the last day of the year, and, without so doing, he might proceed for the forfeiture; but it had been expressly held (*c*), that if a reversion came to the king of a lease, in which there was a right to re-enter for non-payment of rent on demand, he could not maintain ejectment without making a demand; and also, if the king himself made a lease, reserving a rent, with a power of re-entry on non-payment of rent on demand, he could not proceed without a demand. (*d*) This is an authority (and it was not referred to in the case of *Doe dem. Scholfield v. Alexander*) to shew that, where there is an agreement between the parties, there must be a demand before ejectment can be brought; and, if so, then the condition annexed to the right of re-entry in this case, that the rent shall be lawfully demanded, is a restriction of the right, and the lease is not a due execution of the power.

(*a*) 2 Brod. & Bing. 504.(*c*) *Dyer*, 87. 210.(*b*) 2 *Maul & S.* 525.(*d*) *Bacon's Abr.* tit. *Rent*, 127.

The

The fifth objection is, that this is a lease of premises which had been formerly demised jointly with others, at a pro rata rent. The rent, if apportionable, is, in this case, fairly apportioned; but it cannot be apportioned at all. The person in possession of the estate cannot subdivide farms, or lay together two farms which have been let separately; for if he does either of these things, the usual and accustomed rent is not reserved; and it certainly is the practice of conveyancers to insert an express authority in settlements for that purpose. The fifth resolution in Lord Mountjoy's case is an authority expressly in favour of this objection. In *Smith v. Trinder* (*a*) a similar question arose, but was not decided. The statute 39 and 40 G. 3. c. 41. is a legislative declaration of the law upon that subject. Before that statute ecclesiastical persons might, under the 32 H. 8. c. 28., grant leases for twenty-one years or three lives, reserving the rent most accustomably paid within twenty years next before such lease, and it had been considered, that ecclesiastical persons could not grant a lease of a part at a pro rata rent, and the 39 and 40 G. 3. c. 41. was passed expressly to remedy that inconvenience, and to enable them so to do; but it does not apply to tenants in tail, or at all interfere with private settlements; and if, before that statute, ecclesiastical persons could not grant a lease of a part at a pro rata rent, it follows, that persons having such a power of leasing under settlements, cannot now grant a lease of a part at a pro rata rent.

1822.

Dex dem.
Earl of
Shrewsbury
against
Wilson.

W. E. Taunton, contra, was stopped by the Court.

(*a*) *Cro. Ch. 22.*

ABBOTT

1822.

Deo dom.
Earl of
Surrey
against
Wilson.

ABBOTT C. J. I am of opinion that this is a good and valid lease. The objections taken to it arise upon a supposed variance between the terms of the lease and the power under which it was granted. By the power a lease may be granted for twenty-one years, or for any term of years determinable upon three lives, "so as, upon all and every such lease and leases, there be reserved and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same." It appears, that on the 2d *February*, 1708, (which was before the act of parliament by which the estate was settled, and prior to the statute of the 4th G. 2. c. 28) a lease had been granted of these and other premises, in which there was the following reddendum, "yielding and paying, therefore, yearly and every year, during the said term, thereby letten unto the said duke, his heirs and assigna, the yearly rent or sum of 82*l.*, at the two usual feast-days or terms in the year, called the feast of the annunciation of the blessed virgin *Mary*, and the feast of *St. Michael* the archangel, by even and equal portions." Whether any lease was granted between that lease and the lease of the 13th January, 1756, does not distinctly appear. The next lease stated in the case, is one of the 13th *January*, 1756, by which the premises which are comprised in the lease in question in the present case (being a part only of what had been demised by the lease of 1708) were demised, and the rent reserved was 32*l.* 10*s.* per annum, payable at *Lady-day* and *Michaelmas* in every year. The lease of the 6th *January*, 1785, reserves a rent of 50*l.* per annum, payable at the same two feasts as are mentioned in the two former leases. It is observable, too, that each of those leases is granted at a period

period less than half a year before the first day of payment. The first objection made to the present lease is, that the rent being reserved half-yearly, the first payment is to take place at a period less than half a year distant from the day of the demise; and in support of that objection, the case of *Doe v. Giffard* has been cited. That case, however, is very distinguishable from the present. In that case the power was to lease, at the best and most improved yearly rent that could be obtained. The power under which this lease is granted, requires that there be reserved the usual and accustomed yearly rent. Now, as far as we have any evidence what the usual and accustomed yearly rent was, it appears to have been a yearly rent payable at *Lady-day* and *Midsummer*. I am therefore of opinion, that a rent payable at those days, although the right to demand it arose in less than half a year, is a usual and accustomed rent, within the meaning of those words in the condition contained in the leasing power. Indeed, when we consider that this is a lease for lives, granted upon the surrender of another lease, we cannot help seeing, that it is, in effect, an extension of time upon fresh terms, and where the time only is extended, it is most reasonable that the day of the payment of the rent should continue to be the same, and should not vary according to the day on which the new lease may happen to be granted.

The second objection is, that there is, in the lease in question, a half-yearly reservation of rent, whereas it is contended, that the words of the condition contained in the leasing power cannot be satisfied unless the rent reserved be payable once a year only, viz.: at the end of the year after the making of the lease. The

1822.

Doe dem.
Earl of
Shrewsbury
against
Wilson.

1822.

~~Dec. 22.
Bill of
Solicitor
General
Wilson.~~

observation I have already made, that a yearly rent, payable at *Lady-day* and *Michaelmas*, was the usual and accustomed yearly rent, applies also to this objection. It is admitted, that if the words of the power had been "so that there be reserved and made payable during the continuance thereof, the usual and accustomed yearly rent," without the word "*yearly*" immediately following the word "*payable*," a rent reserved half-yearly would have been sufficient, that is, that a payment by portions at the end of each half-year, or at the end of each quarter of the year, does not prevent the rent from being, in the common understanding of mankind, and in common parlance, a yearly rent. I cannot see any reason why the words "*payable yearly during the continuance thereof*," should make any difference. I cannot suppose the legislature to have intended in this case to make the rent payable only once a year, which certainly is unusual, and not beneficial to the landlord. To adopt the construction contended for would be to suppose that the legislature intended that the leases to be granted under the act of parliament, should be different in their form and effect from ordinary leases of lands and tenements, granted at beneficial rents. I cannot think that this was intended, and, therefore, I cannot give that construction to the words in this lease. The ordinary reservation of rent in leases is "*yielding and paying yearly and every year*." In this case the words are "*yearly during the continuance thereof, the usual and accustomed yearly rent*," which I understand to be the yearly rent of so many pounds, by so many half-yearly or quarterly payments in the year; and I think we ought to construe these words "*payable yearly*," with reference to the common language of leases, which was the

the subject respecting which the legislature was speaking in the clause before us.

The 3d objection is, that the clause enabling the landlord to distrain is a restriction upon him, and injurious to the remainder-man; for it is said that, under this power, he cannot distrain without making a demand, and when he has made the distress, that he cannot sell. Now, if this objection avoid the lease, it must do so, not by reason of its contravening any particular condition contained in the leasing power, but by reason of its being contrary to its general nature and object, which is, that there should be a lease at a yearly rent, with the usual and beneficial modes of enforcing payment. It is to be observed, that the clause itself refers not merely to the payment of the rent of 50*l.*, but to payments in nomine poense: the words are "if it shall happen the said yearly rent, or sum of 50*l.*, shall not be paid at the days and times aforesaid, or if the said amerciaments, pains, fines, and penalties, in nomine poense, after reasonable demand be not paid, then the lessor may distrain." It appears, however, that this clause was copied from the lease of 1708, and we ought to pause before we hold, that such a clause, copied from the former lease, (and which the party who prepared the instrument, after the act of parliament, probably had before him) vitiates this lease. I cannot think, however, that the landlord is abridged by this clause of any remedy for the recovery of his rent, which he otherwise would have had. Independently of this clause, the landlord has a power to distrain, and a power to sell under the distress. And I cannot give such an effect to the language of this clause as to say, that it was intended to deprive the landlord of any power which he had by the common and statute law.

1822.
Doc dep.
Earl of
Shaftesbury
come
Wiltshire.

1822.

Doe dem.
Earl of
Shrewsbury
against
Wilson.

The true construction of it appears to me to be, to consider it as introduced in furtherance of the power under the common law, and I think that we cannot give it the construction contended for, unless we see clearly that the landlord, at the time of granting it, intended to take away the power under the common law.

The fourth objection is as to the right of re-entry. It is said, this is to be only at the end of twenty-eight days after the rent is in arrear, and the same "being lawfully demanded." Now as to the right of re-entry not accruing till the expiration of a given number of days, the case of *Smith v. Doe dem. the E. of Jersey* is directly in point. It was there decided, that the words contained in this power, "so that there be conditions of re-entry for non-payment of rent," are to be interpreted to mean a usual or reasonable condition of re-entry; and if that be so, it appears from the lease of 1708, that twenty-eight days are there given for the payment of the rent, before the landlord can re-enter; with this additional clause in favour of the tenant, that if there be no sufficient distress upon the premises, the landlord may then re-enter.

Another objection is, that by the terms of this lease the landlord is "to re-enter on the rents being lawfully demanded;" and it is said, that this puts the landlord to the necessity of making the demand, notwithstanding the stat. 4 Geo. 2. c. 28, which was made generally for the purpose of relieving the landlord from the necessity of making that demand. In *Doe dem. Schofield v. Alexander*, three of the judges of this court, Lord *Ellenborough* C. J. rather doubting than dissenting, decided that, notwithstanding the words "lawfully demanded" in a lease, the landlord has a right to the benefit of the statute of 4 Geo. 2. c. 28., and may re-enter. I certainly am of that

that opinion. By the common law the landlord never could re-enter without making a demand. Every clause of re-entry, therefore, contained the words "lawfully demanded," in effect, though not in terms; and therefore in the lease of 1708, those words were quite nugatory. They were probably copied inadvertently into the subsequent leases without considering their effect. I am of opinion, that such a proviso for re-entry, which was originally introduced for the benefit of the landlord, ought not to be construed, in consequence of the introduction of those words (which were nugatory in the former leases) to deprive the landlord of the benefit intended to be conferred upon him by the statute 4 Geo. 2. c. 28. The case might have been otherwise, if the lease had contained an express covenant that he would not re-enter without demand, or that having entered he would not sell.

Then comes the last and remaining objection, which raises this question: whether the rent can be apportioned? Whether or not it is competent to the owner of a considerable estate to make any improvement or alteration in the mode of disposing of that estate? If he cannot divide a farm, but is bound to let it altogether, as it formerly was, improvement must in many cases be utterly prevented, and the remainder-man be deprived of the benefit. Independently of authority, I certainly should have thought that that which was for the benefit of the estate might lawfully be done, and that an apportionment of rent might be made, and that the land might be subdivided, provided care was taken to apportion for the parts of the farm so divided, as much rent as had been reserved in respect of them in the lease comprising the whole. Lord Mountjoy's case has been

1822.
Doe dem.
Earl of
SHEREWSBURY
against
WILSON.

1822.

*Per cur.
Lord of
Burlington
against
Wheeler.*

sited upon this point. The doctrine there laid down upon this subject, however, was not the point which the Court there decided, and the very learned person in whose report that doctrine is found, has, in his commentary on *Littleton*, expressly laid it down as law, that there may be a leasing of part, reserving a rent bearing the same proportion to the former rent as the part leased bore to the whole land. He says, "If tenant in tail let part of the land accustomably letted, and reserve a rent pro rata, or more, this is good, for that is in substance the accustomable rent." *C. Litt. 44.* & Lord Mountjoy's case is referred to in the sentence immediately preceding. I am of opinion, that the law, as so laid down by Lord Coke, is consonant to reason, and that it is competent to lease a part, reserving a true and fit proportion of that rent which had formerly been reserved. The case of *Smith v. Trinder* is an authority upon that point. It is true that the 39 and 40 Geo. 3. c. 41., after reciting that doubts had arisen, whether ecclesiastical persons could lawfully grant separate leases of parts of lands usually demised by one lease and under one rent, enables them so to do. But we are not necessarily to infer from thence, that those doubts were well founded. Acts of parliament for the purpose of removing doubts are very beneficial, because they prevent that expence of litigation which otherwise must take place, in order to have such doubts resolved. For these reasons I am of opinion, that this is a good and valid lease, and that the postea should be delivered to the defendant.

BAYLEY J. I am of the same opinion. The objection to the lease is, that it is not conformable to the leasing power contained in the statute 6 G. 1. That act applies

applies not merely to the premises in question, but to lands of very large extent, lying in several different counties; and it appears to me to have been the intention of the legislature, that, as long as there should be heirs of the body of the settlor, the estate should not be alienated. The act contains a leasing power, with this provision, "So as upon all and every such lease and leases there be reserved and made payable, yearly, during the continuance thereof, the usual and accustomed yearly rents, bacons, and services for the same." Now, the first question arises upon these words; and, in order to know what were the usual and accustomed rents, I take it to be quite clear, that we may look to the previously existing leases. That point was decided in *Smith v. Doe deo. R. of Jersey*. (a) It is impossible to tell what was the state and condition of the property which is to be the subject of future leases, unless by referring to what were the then existing leases, nor can it be ascertained what is the usual and accustomed rent, unless by referring to the different leases, to see what has been the rent from time to time reserved. It has been said, that the old lease might be referred to for the purpose of ascertaining the quantum of rent, but not for the purpose of ascertaining the time and manner in which the rent was reserved and made payable. In order to judge, however, whether a rent is usual and accustomed, all the circumstances connected with that rent must be considered. The time and the mode of payment are some of those circumstances from which a judgment may be formed, whether it was the usual and accustomed rent or not. In Lord Mountjoy's case, and in the Dean and

1899.
Dec. 25.
Bart. of
Suffolk
Court
W.M.

(a) 2 Brod. & Bing. 504.

1822.

Deo dem.
Earl of
Surrey
against
Wilson.

Chapter of *Worcester's case*, the Court did refer to the mode in which the old rent was reserved, and from comparing the new and the old reservations, certain objections were made to the existing leases. Now that could not have taken place, unless it was deemed competent for them to look at the old leases, to see the mode in which the old rent was reserved, for the purpose of considering whether it was a usual and accustomed rent. If the old rent is reserved quarterly, the new rent reserved is not usual and accustomed, unless it be a quarterly rent also. In this case, the words of the power are, "so as upon all and every such lease and leases, there be reserved and made payable yearly." Great stress has been laid upon the word *yearly*, and it has been contended, that the true construction of that word requires, that there should be one entire yearly payment. I, however, consider the words "*made payable yearly*," the same as if the words had been, "*payable every year*." In leases there is usually a covenant, that the lessee shall pay yearly and every year, and by the redditum, he is to pay the yearly rent of so much by half yearly or quarterly payments. It appears to me, that the word yearly does not necessarily mean one entire rent for the year, and in this case, although a yearly rent might be more beneficial to the successor, yet it would not be the usual and accustomed rent, for it appears from the old lease, that the usual and accustomed rent was by a half yearly payment. And it cannot be supposed, that with respect to such extensive possessions, it was intended to give an undue advantage to the remainder-man. The tenant for life and the remainder-man must have been intended to be placed on fair and equal terms, and that will not be the case,

unless

unless the rents reserved under the new leases are reserved in the same manner and form as they were in the old ones. It appears, that by the old leases the rent was reserved half yearly, which was as little beneficial to the remainder-man as the reservation in this lease. I think, therefore, that this does not constitute any objection to the lease in question.

The next objection is, that the landlord is restricted from distraining and from selling. That does not appear to me to be so. It is a rule of construction, that where a clause is introduced into a deed, or into an act of parliament in order to confer a benefit, it is not to be construed so as to work a prejudice, or in other words, that where the intention of the clause is to give a further right, it is not to be construed so as to take away any other right existing without it. Now, applying that rule to the present case, this clause must not be construed to take away from the lessor any right he had. At common law, the lessor had an unqualified right to distrain, and by statute to sell the distress. There is another answer to this objection, that this is a reservation in the usual and accustomed mode, for the lease of 1708 contains almost verbatim the same provision with respect to the rent there reserved, and then this rent being reserved exactly under the same circumstances, it becomes in that respect the usual and accustomed yearly rent.

The objection that twenty-eight days are allowed, after non-payment of the rent, before re-entry, is also answered by the old lease, and the decision in the House of Lords, in the case of *Smith v. Doe dem. E. of Jersey*. The words of the condition in the power are, "and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent
and

1822.
Doe dem.
E. of
Sherway
against
Wilson.

CASES IN HILARY TERM

1828.

Doe dem.
Earl of
Salisbury
against
Wilson.

and rents thereby to be reserved." Now this lease does contain a condition of re-entry for non-payment of rent. It is said, however, that it is qualified by the words "being lawfully demanded," which words were not in the lease in the case of *Smith v. Doe dem. E. of Jersey*. In the old lease, in this case, however, it is part of the proviso of re-entry, that the rent shall be lawfully demanded, and, therefore, the proviso in the two leases correspond in this respect, and the tenant in tail in possession, and the tenant in tail in remainder, are to all intents and purposes, upon the same relative terms as they were at the time when the act of parliament was passed.

The remaining objection is, that this is a lease of part of certain premises, which, at the time of passing the act of parliament, were in lease jointly with other property, and that it was not competent to the lessor to lease property separately at a pro rata rent, which had formerly been jointly demised. I think, however, it would be most unreasonable so to construe this power. The only authority in favour of such a construction is *Lord Mountjoy's case*. That case, however, was not decided upon that point. There an acre of waste land was introduced into the lease, and the entire rent was reserved out of that acre, as well as out of the anciently demised lands. The ground of the decision was, that the old accustomed rent was not confined to, and therefore was not issuing out of the old accustomed letten lands. The opinion stated to have been delivered by the Judges upon the other point was extra-judicial; and when we consider that *Lord Coke*, in his commentary upon *Littleton*, which was published some years after *Lord Mountjoy's case*, lays it down as clear law, "that a tenant

pant

tenant in tail may let part of the land accustomably letten, and reserve a rent pro rata, or more," it appears to me, that there either must have been some mistake in that part of the 5th *Cake*, or that the opinion of the profession was decidedly against the doctrine there laid down. I am clearly of opinion, in this case, upon reason as well as authority, that the tenant in tail had a right to let part of the lands, which, at the time of the passing of the act of parliament, were under one demise at one entire rent, provided he took care to reserve the proportion of that old rent which the land divided bore to the whole property. For these reasons, I am of opinion, that the lease cannot be impeached, and, consequently, that the posset must be delivered to the defendant.

HOLROYD J. I am of opinion that the lease is conformable to the power, and therefore a valid lease. The power requires that there be "reserved and made payable yearly, during the continuance of the lease, the usual and accustomed yearly rents, boons, and services for the same." If, then, there be reserved in the lease, and made payable during the continuance thereof, the usual and accustomed yearly rents, boons, and services, the lease is valid. Whatever might have been my opinion upon some of the points, if the case of *Smith v. Doe dem, E. of Jersey* had not been decided, I must now take the law to be such as it was finally decided in that case. That case established two points, first, that a reference might be had to the former leases, for the purpose of ascertaining what was the usual and accustomed rent, and for such other purposes as form the subject of contest upon the present occasion; secondly, that

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that the same construction is not necessarily to be given to the words of the power, as the same words must have received if they had been used in the lease itself. One objection is, that this rent in this lease is reserved half-yearly, and that the power requires that it should be reserved and made payable yearly, during the continuance thereof, &c." It is admitted, that if the word yearly had referred to the reservation only, and not to the mode of payment, this would have been a sufficient execution of the power, though the rents be made payable half-yearly. I think, however, that in common parlance the word yearly, used in this and other leases, means, not a payment of rent once a year, but that the same is to be paid in or during every year, and that seems evidently to have been the meaning of the person who prepared this lease; for the words of the redditum are, "yielding and paying yearly and every year, the yearly rent or sum of 50*l.*, upon the 25th *March* and the 29th *September*, by even and equal portions." So that the person who framed this lease, states it to be a yearly rent, and still makes it payable by two half-yearly payments, and that is consistent with the old leases. In one sense of the word, therefore, this rent is payable half-yearly, but, in another sense, it is payable yearly, because it is payable during the year; and if the latter sense can be given to the expression in this lease, I think it ought to be construed to have that meaning. Besides, if we refer to the former leases, which, according to the case of *Smith v. Doe dem. E. of Jersey* we are at liberty to do, this appears to be the usual and accustomed yearly rent; for it is payable yearly in the accustomed manner, that is, every year, by the two usual half-yearly payments.

Another

Another objection is, that the rent reserved was made payable at an earlier day than it would have been payable, if it had been made payable at the end of each year; and it has been said, that the power must be construed in the same manner as if the very words of the power were contained in the lease itself; and, undoubtedly, if the reddendum had been yielding and paying yearly, without saying any thing as to the times of payment, no rent would have accrued due until the last day of the year. In *Smith v. Doe dem. E. of Jersey*, a similar argument was used, for it was contended, that if the lease in that case had provided, that a party should have power to re-enter, on non-payment of rent, he might enter immediately upon default being made. The House of Lords, however, decided otherwise, for they construed the words giving the right of re-entry in a different sense from that which they must have received, if they had been used in the lease itself. In this case, the rent is made payable half-yearly, and whatever might have been the case, if it had not appeared from the former leases, that that was the usual and accustomed mode of paying the rent, I think it does appear from them, that this was the usual and accustomed rent, payable in the usual and accustomed manner.

Another objection to the lease is, that the clause of distress takes away the right of the party to distrain previously to the demand of the rent, and also that when he has distrained, it takes away the power of selling under the statute. I think, however, that this being a covenant for the benefit of the landlord, it does not take away any right which he had by common law, or by statute, and consequently, that notwithstanding that covenant, he might distrain without demand, and might

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sell the distress. Besides this objection goes to its not being the usual and accustomed rent. Now it appears that this clause has been adopted from the former leases, and therefore that this is the usual and accustomed rent, reserved in the usual and accustomed manner.

Another objection is, that the right of entry is postponed for twenty-eight days; that point, however, was determined in *Smith v. Doe dem. E. of Jersey*; and besides, the former leases had this very clause, and therefore afford an answer to that objection. The same answer applies also to the qualification as to the rent being lawfully demanded, and I am of opinion, that the 4 Geo. 2. does apply to a case of this kind, and that notwithstanding those words the landlord, without making any demand, might enter, distrain, and sell.

I am also of opinion, upon principle as well as authority, that a party may demise a part of premises formerly demised jointly with others, provided he reserve a fair rent. The passage referred to from *Coke upon Littleton*, 44. b., is a strong authority upon that point, and I think the doctrine there laid down by Lord Coke a right exposition of the law. For these reasons, in addition to others which have been given by my Lord and my brother *Bayley*, it is my opinion that since the decision in the case of *Smith v. Doe dem. E. of Jersey*, whatever might have been the case previously, this lease must be considered as valid.

Judgment for Defendant. (a)

(a) *Bes^t J. was absent at Chambers.*

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BARTON and Another *against* WILLIAMS and
Others.

TROVER to recover from the defendants the value of certain *East India* warrants for the delivery of a quantity of cotton, and certain quantities of cotton stated in the declaration. At the trial before Abbott C. J., at the *London* sittings after last *Michaelmas* term, a verdict was found for the plaintiffs, damages 7397*l.*, subject to the opinion of the Court on the following case :

In the year 1818, *John Moon*, who then carried on business at *Manchester* as a cotton merchant under the firm of *J. Moon and Son*, having agreed with the plaintiffs (who also carry on business at *Manchester*) to make a purchase on joint account with them of cottons, gave directions to his brokers, *Hunt and Sharp of London*, to purchase at the *East India Company's* sales cotton to a considerable amount, on the account of *J. Moon*. *Hunt and Sharp* accordingly purchased at several sales between the months of *January* and *June* in that year, cotton to the amount of 20,000*l.*, and obtained orders for

A. and B.
having agreed
to purchase
cottons on their
joint account,
directed their
brokers to pur-
chase the same.
These pur-
chases having
been made,
warrants or
orders for de-
livery were
made out in the
name of the
brokers, and
the cottons
were left in
their possession,
as the brokers
of *A.* Imme-
diately after the
purchase, *B.*
paid *A.* one
half the value.
After consider-
able purchases
had been made,
the brokers
were informed
that *B.* had an
interest in the
goods pur-

chased; *A.*, after this, directed the brokers to procure him a loan on the security of the warrants, and *C.* advanced money by discounting bills drawn by *A.* upon the brokers, as a security for which, the whole of the warrants were deposited with *C.* by the brokers. While they were so deposited, the brokers received directions, both from *A.* and *B.*, to make a division of the goods held on their joint account, which they did, by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by *A.* to get one half renewed, which *C.* agreed to do, and discounted fresh bills, and the brokers then left in the hands of *C.*, as a security for the money thus advanced, the warrants belonging to *B.*; *C.* however, not then knowing that *B.* had any interest in them:

Held, first, that the first pledge did not transfer to *C.* any interest in that part of the goods which belonged to *B.* Semble, that a sale by one of two tenants in common of the whole property, is a conversion as to the share of one, and consequently that trover is maintainable:

Held, secondly, that after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and that being so, the second pledge was the pledge of a specific chattel belonging to *B.*, which the brokers had no authority to make, and that trover was maintainable.

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the delivery of it, commonly called *East India* warrants, which were made out in the name of *Hunt*, as the broker employed at the sale, and were left in the possession of *Hunt* and *Sharp* as the brokers of the said *John Moon*. The plaintiffs, immediately after the purchases, paid *Moon* and Co. one half of the value of the cottons. *Hunt* and *Sharp* knew that *Moon* and Co. were occasionally in the habits of making purchases on joint account, but at the time of making the first purchases in question, had no knowledge that the plaintiffs were in any way concerned. When half the purchases were completed, they were apprised that the plaintiffs had some interest in the purchases in question. It was subsequently agreed between the plaintiffs and *J. Moon*, that the cottons should be divided, and accordingly in *February*, 1819, written directions were given by the plaintiffs to *Hunt* and *Sharp* to make division of the cottons held by them on the joint account of *Moon* and the plaintiffs, and they having received similar directions from *Moon* and Co. proceeded to make the division by specifying in separate columns the warrants which were respectively appropriated to the plaintiffs and *Moon* and Co.; and on the 20th *February*, 1819, they communicated such division to both parties, and received their approbation of the same. At the latter end of *November*, 1818, *Moon* directed *Hunt* and *Sharp* to procure him a loan of from 20,000*l.* to 25,000*l.* on the security of the *East India* warrants then in their possession, and they informed the defendants of the request of *J. Moon*, and applied to them to discount the acceptances of them, *Hunt* and *Sharp*, on bills drawn on them by *Moon* and Co., on the security of the whole of the warrants, which the defendants agreed to do, and accordingly eight bills,
payable

payable at three months after date, were drawn by *J. Moon* and Son, upon and accepted by *Hunt* and *Sharp*, falling due respectively 27th *February*, 1st *March*, 3d *March*, and 4th and 5th *March*, all of which were duly paid at maturity. These bills were discounted by the defendants at the beginning of *December*, 1818; and at the time of receiving the money from the defendants, and as a security for the payment of the bills, *Hunt* and *Sharp* deposited with the defendants the whole of the warrants.

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On the 23d *February*, *Hunt* and *Sharp* received from *Moon* and Co. the following directions, contained in a letter, dated 15th *February*, 1819: "Half the amount from *Williams*'s is all I would wish, or even nothing, if you can force off every bale of cotton I have in *London*. Cash in time, if half should be done by *Williams* and Co. Mr. B.'s warrants might remain." And, in consequence, an application was made by *Hunt* and *Sharp* to the defendants to renew 10,000*l.* of the amount of the original bills, which the defendants agreed to do, by discounting other bills, similar to the former, on a sufficient number of the warrants to cover them to that amount being left as a security for such renewal. *Hunt* and *Sharp* did not, at any time previous to such renewal, communicate to the defendants that any alteration had taken place in the property, or that the plaintiffs had any concern in it. On the 2d *March*, *Sharp*, of the firm of *Hunt* and *Sharp*, received the warrants from the defendants, for the express purpose of dividing them, so as to take 10,000*l.* worth of them away, and to return 10,000*l.* worth to the defendants, to remain as a security for the renewed bills, and took them to his counting-house for the purpose of making such separation; and

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having done so, returned to the defendants the warrants belonging to the plaintiffs, and retained those which had been appropriated to *Moon* and Son; and, in so doing, acted by the direction of *Moon* and Son; but without any communication with or authority from the plaintiffs. The defendants discounted two bills, of 2490*l.* 8*s.* and 2569*l.* 12*s.* respectively drawn as before, by *Moon* and Son, upon and accepted by *Hunt* and *Sharp*, on the 2d of *March*; and two other bills, of 2496*l.* 15*s.* and 2564*l.* 15*s.*, on the 11th *March*; which four bills amounted to 10,121*l.*, and which were dishonoured when they became due. The defendants sold the cottons in question for 7337*l.*

The question for the opinion of the Court was, whether the plaintiffs were, under the circumstances, entitled to maintain the action of trover.

F. Pollock, for the plaintiffs. The original pledge of all the warrants cannot be sustained as against the plaintiffs. And, if it could, at all events the renewed pledge, made subsequently to the division of the property, cannot be sustained. There is a material distinction between a sale and a pledge. In the case of a sale, the purchaser trusts the property; in the case of a pledge, the party lending his money trusts the individual who borrows; and if the latter has no authority to pledge, the pledge is not available. In this case, the brokers, in *August*, knew the property to belong to *Moon* and the plaintiffs, and then, by *Moon's* direction, pledged the whole with the defendants. Now, the brokers had no authority to pledge the plaintiffs' share; and, therefore, the pledge is not available as against them; and, if that be so, supposing the brokers to have

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been justified in pledging the warrants, as far as *Moon's* share was concerned, the defendants would thereby become tenants in common with the plaintiffs of the whole property and the sale by them is a conversion as to the plaintiffs' share; for the sale having taken place in *London*, was a sale in market overt; and, therefore, operated as a destruction of the property, and, consequently, trover is maintainable. It is clear, however, that after the division of the property, the brokers had no authority whatever to pledge the share belonging to the plaintiffs. All the warrants were returned into the brokers' hands, and it was their duty, as the agents of the plaintiff, to retain those which belonged to them. Instead of which, however, they, by the direction of *Moon*, leave the warrants, which were then the property of the plaintiffs, as a security for money advanced to *Moon*. They could not thereby convey any interest in the plaintiffs' separate property to the defendants; and the sale by them of that property is a conversion.

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Tindal, contra. This was, in the first instance, a deposit by the broker of warrants belonging to his principal, *Moon*, at the request, and for the benefit of the principal, and of which the principal had the sole power of disposal, as between him and the broker. *Moon* gave the directions to the broker to purchase on his own account, and the purchase was so made, and the warrants were deposited with *Hunt and Sharp*, as the brokers of *Moon*. *Moon*, therefore, at the time of the first pledge, had the sole right of disposing of the warrants, and he having authorized the brokers to pledge, the defendants by that pledge acquired an absolute interest in the property. But even if that were

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not so, and the brokers only had authority to pledge the undivided share of *Moon*, the defendants, by taking that pledge, became tenants in common with the plaintiffs; and then it is clear, that trover cannot be maintained by one tenant in common against another. And a sale does not amount to a conversion. In this case too the subsequent division of the cottons, and the fact of the brokers having returned the plaintiffs' warrants instead of those of *Moon's*, as a security for the renewed bills, cannot make any difference, for all the bills were subject to the lien. The warrants were delivered to the brokers for an express, specific purpose, viz. to divide them, and to return one half to be subject to the lien of the old and the renewed bills for 10,000*l.* The warrants were never out of the defendants' possession, for the brokers for this purpose were their agents, and the possession of the brokers, therefore, was the possession of the defendants. If the bankers themselves had made the division in their own office, it is clear that they would have had a lien upon the warrants retained. The warrants were carried to the brokers' counting-house merely for convenience, and consequently the lien continued. If there had not been any previous division of the property, there would have been no doubt upon this point, but such division cannot make any difference, being done without the knowledge of the pawnee, especially where the plaintiffs have allowed *Moon* to hold himself out to the world as the ostensible owner. In *Rabone v. Williams* (*a*), it was held in the case of a factor dealing for a principal, but concealing his principal's name, that a person contracting

(a) 7 T. R. 360.

with

with him has a right to consider him, to all intents and purposes, as a principal, and that though the real principal bring the action in his own name, the purchaser may set off any claim he has against the factor. And so if there is a secret partner unknown to the defendant at the time he contracts with the plaintiff, the plaintiff cannot, by joining such secret partner in the action, deprive the defendant of his right of set off against himself, *Stracey v. Deey*. (a) It is clear too, that if the plaintiffs were partners with *Moon*, the original pledge by one of the partners was valid.

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ABBOTT C. J. I am of opinion that the plaintiff is entitled to recover. I think it clear, that the pledge by *Hunt* and *Sharp* cannot, in point of law, operate so as to give to the defendants any right or interest in that part of the goods which belong to the present plaintiffs. It has been said, however, that trover cannot be maintained, because there was no conversion, on the ground that at the time of the original pledge, the plaintiffs were tenants in common with *Moon*, who was the owner of an undivided moiety. It is laid down by Lord Chief Baron *Comyn*, that if a bailee sells the goods of another, the very act of sale on his part is such a conversion as to entitle the owner to maintain trover (b), and if that be so, it follows, that if a bailee, in possession of undivided shares belonging to two persons, sells the whole, it must be a conversion as to the undivided part belonging to one, over which he has no right or title whatever. I incline to think, therefore, upon that ground, that the pledge could

(a) 7 T. R. 361.

(b) *Com. Dig. tit. Action on the Case upon Trover*, E. and 2 *Salk.* 655.
is cited.

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not operate upon the property of the plaintiffs; and that even if there had been no partition, the sale was a conversion of the undivided interest, and therefore that trover may be maintainable. Upon the other point I do not entertain any doubt. In this case, after the warrants were in the hands of the defendants, a partition was made between the plaintiffs and *Moon*, and thereby the tenancy in common was determined, and after that partition, an entire new transaction takes place, for *Moon* and Son agree not to hold the defendants to the payment of the bills originally accepted, but fresh bills are drawn in the same manner, and by the same parties. It is a new pledge, and having taken place after a partition was made between two tenants in common, it was the pledge, not of an undivided moiety, but of a specific chattel, of which the property was at that time vested in the plaintiffs, and made by a person having no authority to pledge. I am, therefore, clearly of opinion upon the last ground, that the plaintiff is entitled to our judgment.

BAYLEY J. It is clear law that a pawnee can have no better title than the pawnier. At the time of the original pledge, *Moon* and Co. and the plaintiffs were not partners with reference to these goods, but part-owners; each of them being entitled to an undivided moiety. *Moon* and Co. then take upon themselves to pledge the whole, the legal operation of which pledge would be to give to the pawnee no better title than *Moon* and Son had, which would be an undivided moiety only. And if the case had stopped there, *Moon* and Son before the pledge, and the defendants after the pledge, would have had a right to sell an undivided moiety only; and if they had taken upon themselves

themselves to sell without any authority from the plaintiffs, either express or implied, from the nature of the transaction they would have been wrong doers with respect to the sale of the plaintiffs' moiety; that would be a wrongful sale, and consequently a conversion of their property. There may be cases in which the indivisible nature of the subject matter of the tenancy in common, may raise an implied authority in one to sell the whole. But unless there be such authority, either express or implied, a sale of the whole by one tenant in common is, with respect to the other, a wrongful conversion of his undivided part. But this case does not stand upon the original pledge, for afterwards a renewal of the bills took place, and all the warrants were put into the hands of the brokers, in order that a part might be withdrawn from the pledge, and that the residue might continue liable, not for the old pledge, but merely in respect of the new bills which were to be given for part of the whole debt; and the brokers acting in that transaction, as the agents of *M.* and Co., had a right to pledge their share only; for in the intermediate time, there had been a bargain between *M.* and Co. and the plaintiffs, that certain of the warrants should be deemed the separate property of each party. At that time what authority had the brokers? They had authority to pledge the property of *M.* and Co., but none whatever to pledge that of the plaintiffs. But, instead of pledging that over which they had an authority, they pledged that which belonged to the plaintiffs, and the present defendants, who took that pledge, took it at the peril of the want of authority in the person making it. For these reasons, I am of opinion, that the defendants had no right to dispose of the

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warrants in question, and that the action of trover is maintainable.

HOLROYD J. I am also of opinion that the plaintiffs are entitled to recover the amount of their claim in the present action. It is clear, that, originally, the brokers had no right to pledge the share which the plaintiffs had in the cottons which were purchased. It is true, that they were purchased by the brokers, as the property of *Moon*, they at first not knowing that the plaintiffs had any interest in them. All the purchases, however, were, in point of law, made on the account of *Moon* and the plaintiffs, for *Moon* and the plaintiffs had agreed that the purchases should be made on their account, and the plaintiffs having paid their moiety of the purchase-money, had an interest and property in one moiety of the goods. Having that property, the brokers, whether they supposed *Moon* to have the sole property or not, could not, in point of law, by the direction of *Moon*, pledge that which was the property of the plaintiffs. But an objection is then made to the form of the action on this ground, that the plaintiffs and *Moon* having originally been tenants in common, the pawnee is now tenant in common with the plaintiffs, and, consequently, an action of trover is not maintainable. The case of *Jackson v. Anderson* (a) goes strongly to shew, that there was not such a joint-tenancy or tenancy in common in this case, as to prevent the plaintiffs from maintaining trover. I am, however, not quite satisfied upon that point, but my opinion proceeds upon the second point. In this case, all the acceptances for the 20,000*l*, which were

prior to the division of the warrants, were duly paid at maturity, and the whole of that debt was extinguished. Now, after the division of the warrants, had taken place, the parties ceased to be tenants in common, if they ever were such, and *Moon* had a separate property in one-half of the goods and the plaintiffs a separate property in the other half. That being so, I think it perfectly clear, that the brokers had no right to pledge the warrants which had thus become the property of the plaintiffs, that the defendants had no lien at all on those warrants, and of course, that the objection as to the form of the action does not apply.

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BEST J. I am of the same opinion. It appears to me that, from the commencement, this was the joint property of *Moon* and the plaintiffs; and if *Moon* were even a partner with the plaintiffs in this particular transaction, I am of opinion, that he had no right to pledge the property. A partner in a trading concern generally may dispose of the partnership property, because his authority to do so is implied from the nature of the business; but that by no means extends to a case of a partnership in a particular instance. Partners in a trading concern are joint tenants as to the partnership property. In this case the plaintiffs and *Moon* were at most only tenants in common. Now, one joint tenant may lawfully dispose of the whole interest; but one tenant in common cannot do so. If the whole property had been in this case sold by *Moon* himself, I am of opinion that the property of the plaintiffs would not have been bound, unless it were a sale in market overt, and such a sale becomes binding, not by the authority of the persons selling, but from the general policy of the law. But this

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is not a sale at all, but a pledge. In cases of sale in market overt, you look to the property, but in those of sale out of market overt, the principle of caveat emptor applies; and in the case of a pledge, the responsibility of the pawnner must be relied upon, and if he has no authority, the pledge is not available. I am of opinion, that this being the property of the plaintiffs, neither *Moon* and Co. nor their brokers could, by any act of theirs, convey the plaintiffs' interest in the property to the defendants. It is said, however, that although they could not convey the plaintiffs' interest, they could still convey their interest as tenants in common, and if so, that the defendants are now tenants in common with the plaintiffs, and that upon that ground the present action is not maintainable. The case of *Jackson v. Anderson*, is an authority to shew that *Moon* and the plaintiffs were not tenants in common. The ground, however, upon which I am best satisfied to found my judgment is, that the tenancy in common in this case was completely determined, and that afterwards the separate interest of the plaintiffs was ascertained, the whole of the bills were given up, and a new pledge made; and then that was an entirely new transaction, and when it took place, the first debt was extinguished, and the brokers had no authority whatever to convey the separate property of the plaintiffs. Upon this latter ground, I am clearly of opinion that the plaintiffs are entitled to recover.

Judgment for the Plaintiffs (a)

(a) This case was afterwards turned into a special verdict. Vide *Raba v. Ryland*, *Gow's N. P. Rep.* 152, and *Tupper v. Haythorne*, *ibid.*

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Doe dem. EDWARD HUMPHREYS against
ROBERTS.

EJECTMENT for premises in the parish of *Holywell*, in the county of *Flint*. Plea, not guilty. The cause was tried before *Garrow B.*, at the last assises for the county of *Salop*, and the question was, whether certain premises, situate in *Bakehouse Lane*, in the town of *Holywell*, passed under the will of *Thomas Humphreys*, under which the lessor of the plaintiff claimed. The will was dated the 5th June, 1775, and recited a marriage settlement, on the marriage of the testator, by which all the messuages, lands, or tenements, belonging to the testator or his mother, *Mary Humphreys*, situate in the county of *Flint*, were settled after his decease, in default of issue by his wife, and subject to two annuities to his mother and his wife for life, to the use and behoof of himself, his heirs and assigns for ever. The will then recited that he had not any issue by his wife, and proceeded as follows. "Now I do give and devise all the said capital and other messuages, tenements, lands, hereditaments, and premises, with their appurtenances, in manner and form following, that is to say, as to and concerning all that messuage or dwelling-house, with the appurtenances, situate in *High-street*, in the town of *Holywell*, in the said county of *Flint*, wherein my said mother inhabits, and nearly opposite to the *White Horse Inn*, together with the shop adjoining the same messuage; and all and every my buildings and hereditaments in the same street I do give and devise the same unto and to the use of my said mother, *Mary Humphreys*, for her natural life." The testator then, after declaring that the premises

last

A. by his will, devised all his messuage or dwelling house, with the appurtenances, in *High-street*, in the town of *H.* and all and every his buildings and hereditaments in the same street to his mother for life, and after her death to *C. D.* *A.* had only one house in the *High street*, but behind that house he had two cottages fronting a lane called *Bakehouse-lane*. There was no thoroughfare through that lane, the only entrance into being from the *High-street*: Held, that the two cottages passed under the will.

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last mentioned were to be exempt from the annuities to his mother and his wife, which he charged upon the residue of his estate, devised all the other lands comprised in the marriage settlement, except the premises limited to his mother for life, to trustees, for 500 years; in trust, to sell or mortgage the same, in order to pay his debts, and certain legacies mentioned in the will; and then, as to all his estate, as well that which was subject to the trust term of 500 years, as what was limited to his mother for life, from and immediately after her decease, he devised the same to his brother, *John Humphreys*, for life, and after his death to his sons and daughters in tail, with remainder to *Hugh Humphreys* for life, and his sons and daughters in tail, with remainder to *Edward Humphreys* for life, &c. The testator died in 1788, his mother, *Mary Humphreys*, having died in his lifetime; *John Humphreys* and *Hugh Humphreys*, his brothers, died without issue; and *Edward Humphreys* is the lessor of the plaintiff. The trustees for the term of 500 years had sold, in June, 1790, the house in *High-street* and the two cottages in *Bakehouse-lane*, to one *S. Davies*; the latter sold them to *David Pennant*, under whom the present defendant occupied one of the cottages. In another ejectment tried at the same assizes, with respect to the house in *High-street*, which nearly fronted the *White Horse Inn*, it was admitted that the lessors of the plaintiff were entitled to recover. *Bakehouse-lane* contains thirty houses, belonging to several owners, and though not a thoroughfare, is wide enough to admit carriages; the entrance thereto is out of *High-street*, under an arch-way, a little below the house in *High-street*. The cottages are situate in *Bakehouse-lane*, on the opposite side of that lane, fronting the back of the house in *High-street*, having that and the

other

other houses in *High-street* interposed between them and the White Horse Inn. The testator had no other premises in or near *High-street*. The learned Judge was of opinion, that the two cottages passed under the will, and he directed the jury to find a verdict for the plaintiffs, with liberty to the defendant to move to enter a nonsuit; a rule nisi for that purpose having been obtained in last *Michaelmas* term.

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Doe dem.
HUMPHREYS
against
ROBERTS.

W. E. Taunton shewed cause. It is quite clear, that the testator did not intend that his devise should be confined to those premises which were occupied by his mother; if such had been his intention, why should he add to the description of those premises the words which immediately follow, "all and every my buildings and hereditaments in the same street." In order to ascertain the testator's meaning, it is material to refer to other parts of the will. It begins by reciting the testator's marriage settlement, by which some property of his mother's as well as his own was settled to certain uses; he next mentions his intention to dispose of the whole of that property, and then introduces the clause in question as to a part of it, which clause is followed by a disposition of the residue to other uses. It appeared that there was no other street to which the two cottages in question could be said to belong, except the *High-street*.

Puller and *R. V. Richards*. The description of premises in the will of *T. Humphreys* is extremely minute, and ought not to be enlarged. *Ewer v. Hayden* (a), *Blague v. Gold* (b), *Tuttesham v. Roberts* (c), are in point. *Doe*

(a) *Cro. Eliz.* 476, 658. (b) *Cro. Car.* 447. (c) *Cro. Jac.* 22.
v. Collins

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Doe dem.
Humphreys
against
Rosetta.

v. *Collins* (a) does not apply, there all the premises had been occupied with the house devised. This court was well known by the name of *Bakehouse-lane*; that, therefore, would have been the proper description of the premises. [Abbott C. J. Suppose a man, having no house in the *High-street*, devised his house in the *High-street*, if he had a house in this *Bakehouse-lane*, would not that pass?] It would; but if a man, having one house in *High-street* and another in the lane, devised *all his houses* in *High-street*, the one would pass, but the other would not. The general words "all my buildings, &c," were introduced for the purpose of securing more effectually to the devisee the premises before particularly described. *Doe dem. Tyrrell v. Lyford* (b) is in point, to shew that the Court cannot receive extrinsic evidence to give effect to a will, where it can have an effectual operation without it. [Bayley J. The true ground of that decision was, that there, there was property to satisfy the will. But what other buildings are there in *High-street* to satisfy the will in this case, besides the capital messuage occupied by the mother.] The expression is not *other* buildings, but *all my buildings*. [Bayley J. The word *and* is accumulative. Abbott C. J.. The appurtenances to the principal messuage are described as being in the *High-street*; how were they situate?] They did not abut on the *High-street*, but were behind the house.

ABBOTT C. J. Upon the words of the will, there appears to have been an intention to pass all that the testator had in the *High-street*; and he seems to have thought, that he had something more than the principal

(a) 2 T. R. 400.

(b) 4 M. & S. 550.

messuage

messuage in the occupation of his mother. In fact, however, he had no premises in that street except the principal messuage, unless these cottages are to be considered as coming within the description. There was no other street to which they could be said to belong. I think, therefore, that they passed by the will. The rule for entering a non-suit must therefore be discharged.

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Dor. dem.
HUMPHREYS
against
RESCARRE.

BAYLEY J. In cases of this kind, we should endeavour to discover the meaning of the testator. If the description is precise, and there are premises to satisfy it, and there are other premises also, there the others will not pass. If, however, the description is not precise, if you cannot satisfy the will, unless additional property passes besides that which is described, then you must presume, that the testator intended to pass that property, and that his description is inaccurate. Here, after mentioning the capital messuage, the testator adds, all and every my buildings in the said street. He had no other property fronting the *High-street*, but had other property to which there was no access but from that street. I think, therefore, that the testator's meaning is to be extended beyond the words, "in that street," and that the cottages in the court passed by the will. This rule must therefore be discharged.

HOLROYD J. In this case, I think that the testator intended to pass the cottages in question, and that the words in his will are sufficient for that purpose. He speaks of some other tenements in the *High-street* besides the principal messuage. The only way to these cottages

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Dox dem.
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against
ROBERTS.

cottages was through the *High-street*, and there was no thoroughfare through *Bakehouse-lane*. If there had been an opening from the *High-street* to these two cottages alone, they would clearly be in the street, and I can see no difference from the circumstance of there being other houses in the court. And as there is no other property to satisfy the will, I am of opinion, that these cottages ought to pass. The rule for entering a non-suit must be discharged.

Rule discharged. (a)

(a) *Best J.* was sitting at Chambers.

REX against the Inhabitants of CHIPPING-NORTON.

An indenture of apprenticeship, executed before the passing of the 44 G. 3. c. 98. must be stamped with the premium stamp within the time prescribed by the statute 8 Anne, c. 9. and where such an indenture was stamped at the time of its being produced in evidence, with the stamp required by the 55 G. 3. c. 184. but not within the time prescribed by the statute of Anne: Held, that the indenture was wholly void, and that the pauper, by serving under it, gained no settlement.

UPON an appeal against an order of two justices, whereby *Jane Eely*, widow, and her six children, were removed from the parish of *Aynho*, in the county of *Northampton*, to the parish of *Chipping Norton*, in the county of *Oxford*; the sessions confirmed the order subject to the opinion of the Court on the following case :

By indenture of the 30th October, 1794, *William Eely*, the late husband of the pauper, *Jane Eely*, and the father of her children, not being then settled in the parish of *Chipping Norton*, bound himself to serve *R. Phillips* of *Chipping Norton*, as an apprentice for seven years, and *R. Phillips*, in consideration of 25*l.*, the sum given with the apprentice, covenanted to instruct him in the business of a cooper. The indenture was duly stamped, with a stamp denoting the payment of the several duties, amounting in the whole to six shillings,

shillings, imposed by different statutes upon the indenture itself; but it was not stamped with any stamp in respect to the premium, as required by the statute 8 Anne, c. 9., within the time required by that statute, nor until the making of the order of removal, and after the entering of the appeal against the order. Before the hearing of the appeal, the indenture was stamped, upon the payment of 5*l.* penalty, and of 1*l.*, with a stamp denoting payment of a duty of 1*l.*, being the ad valorem duty stamp used to denote the payment of such duty under the 55 Geo. 3. c 184., and 1*l.* being the duty payable under that statute, in respect of a premium of 25*l.* given with an apprentice. The duty payable in respect of the like premium under the 8 Anne, c. 9., was twelve shillings and sixpence only, the duties payable under both the last mentioned statutes, were, after they were paid into the exchequer, applicable to the same purposes. The stamps used by the commissioners, under the 55 G. 3. c. 184., are of a different sort from those which were required to be procured, and used by the statute 8 Anne, c. 9., which were poundage stamps. These stamps were used until the passing of the 44 G. 3. c. 98.; which imposed an ad valorem duty, and the poundage stamps were disused, and the dies with which they were formed were then broken up, and are not now in existence. *William Eely* served under the indenture in *Chipping Norton*, until the expiration of seven years from the date thereof.

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REX
AGAInst
THE INHABIT-
ANTS OF
CHIPPING-NOR-
TON.

Holbeck and *Marriott*, in support of the order of sessions. A good settlement was gained by the service under this indenture, although it was not stamped at

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against
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ants of
Cupper-Noz-
ton.

the time of the service, nor until after the order of removal. Before the 14 Geo. 3. c. 98. an indenture of apprenticeship required two distinct stamps, a deed stamp and a premium stamp, and this indenture was granted before the passing of that statute, and therefore required two stamps. By the 37 Geo. 3. c. 136. s. 2. the commissioners are authorised to stamp instruments after they have been executed, on payment of the duty and a penalty, and then the instrument so stamped is to be of equal force and validity as if it had been stamped in the first instance. Here the instrument has been stamped. The words of the 55 Geo. 3. c. 184. s. 10. are very comprehensive; besides, it is sufficient if the instrument is properly stamped at the time it is produced in evidence. *Wright v. Riley* (a), *Burton v. Kirkby* (b), *Roderick v. Hovill* (c), proceed on the particular provisions respecting policies of insurance in which the commissioners are prohibited from subsequently stamping the instruments. *Edwards v. Dick* (d) shows that the Court will consider what was the object of the legislature, though the act pronounces an instrument void to all intents and purposes.

Finch, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion that this indenture was void, not having been stamped within the time required by law, and consequently, that the pauper gained no settlement by serving under it. By the statute 8 Anne, c. 9. s. 32. a premium stamp is imposed, and by

(a) *Peake, N. P.* 175.
(c) *3 Campb.* 103.

(b) *7 Townt.* 174.
(d) *4 Barn. & A.* 212.

s. 36. indentures signed within the limits of the weekly bills of mortality, were required to be stamped within one month after the date, and by s. 37. every indenture entered into elsewhere in *Great Britain*, shall be either stamped within two months, or brought within that time to some collector or officer appointed for the management of these duties, who shall indorse a receipt for the duty paid, bearing date on the day of payment. By s. 38. indentures executed within 50 miles, to be computed from the limits of the weekly bills of mortality, shall be stamped within three months, and if at a greater distance, within six months after the date or making thereof. By s. 39. all indentures not stamped within the respective times for that purpose limited by the act, are declared void, and not available in any court or place, or to any purpose whatsoever. Here, therefore, the legislature expressly requires that the instrument shall be stamped within the prescribed time, and declares that, in case of omission, it shall be void to all intents and purposes, and that forms a distinction between this case and those that have been cited in argument. The order of sessions must therefore be quashed.

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—
Rex
against
The Inhabit-
ants of
CHIPPING-NOR-
TON.

Order of Sessions quashed.

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POWNALL *against* MOORES.

A covenant by a lessee that he will sufficiently muck and manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenants laying on two sets of muck within the three last years of the term.

COVENANT. Declaration stated that one *Hugh Pownall*, being seized in his demesne, as of fee, on the 8th *March*, 1808, by indenture of lease demised to the defendant, amongst other premises, a meadow called the *Pinfold Meadow*, to hold for the term of 16 years. The declaration then stated a covenant by the defendant, "that he should and would sufficiently muck and manure the said field, called the *Pinfold Meadow*, with two sufficient sets of muck, within the space of six of the last years of the said term, the last set of muck to be laid upon the said premises within three years of the expiration of the said term." The declaration then stated the entry of the defendant upon the premises, deduced a title to the plaintiff as assignee of the reversion, and alleged as a breach, that the defendant had not manured the said *Pinfold Meadow* according to the said covenant; but on the contrary, that although the three first years of the last six years had elapsed, and considerably less than three years of the term was all that remained, yet the defendant had not laid any manure at all upon the said meadow. The defendant pleaded, that the said term of 16 years, of and in the said demised premises, was still unexpired. General demurrer and joinder.

D. F. Jones, in support of the demurrer. The question intended to be raised, is whether the defendant, upon the true construction of the lease in question, can satisfy

satisfy the covenant into which he has entered, by laying two sets of manure upon the meadow *at any time within the last six years*. The intention of the parties appears to have been, that one set of manure should be laid within the first three, and the other set within the last three of the last six years. It is true, that the terms of the covenant are not expressed with exactness; but the Court will give them a reasonable construction, and in case of ambiguity, will, according to the general rule, take the words most strongly against the covenantor. The course of good husbandry requires, that the meadow should be kept in heart by manuring every three years, and this must have been what the parties had in contemplation. The object was, not merely that the land should be *left* at the determination of the lease with a sufficient quantity of manure then upon it, but that it should be *kept* in a good state of husbandry from time to time during the lease. From its being expressed, that the last set of manure was to be laid on within the last three of the last six years, it is not too much to infer that the meaning of the covenant was, that the first set of manure should be laid on within the first three of the last six years. If a different construction prevail, the lessee may then protect himself by laying on both the sets of manure within the last six months of the term, the effect of which would be evasive of the spirit of the covenant, and would also be contrary to the course of good husbandry, and injurious to the land.

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POWNALL
against
Moore,

Creswell, contra, was stopped by the Court.

ABBOTT C. J. The lessee has only covenanted, that

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he will lay on two sets of manure within the last six years of the term, and that at least one of those sets should be laid on within the last three years of the term. The object of the last mentioned stipulation was, that all the benefit of the manure should not be exhausted during the lessee's holding, but should at least partially continue at the expiration of the term. But the lessee has nowhere restricted himself from laying on both the sets of manure within the last three years, if he should think proper, and we cannot by construction bind him beyond the terms of his covenant.

BAYLEY J. If the plaintiff intended to draw any argument from the course of good husbandry, an allegation to that effect should have been introduced upon the record. But in truth, no such allegation could have availed to extend the covenant in question in the way which is now suggested.

HOLROYD J. and BEST J. concurred.

Judgment for the defendant.

BIRD *against* PEGG and Another.

Where judgment of nonsuit had been given in an action brought against an infant, it is no ground of error that the infant had appeared by attorney.

UPON a writ of error brought to reverse a judgment of nonsuit in the Court of Common Pleas, it appeared upon the record, that the defendants below had appeared by attorney. The error assigned was, that one of the defendants at the time of his appearance, and at the time of giving judgment, was an infant under the age of 21 years. Counsel for the plaintiff in error, contended, that

that this was a good ground for reversing the judgment, although it was in favour of the infant. In *Bird v. Orms* (*a*), an entire judgment against two was reversed, on the ground, that one was an infant and appeared by attorney instead of guardian, and he referred to Serjt. *Williams's* note to the case of *Foxwist v. Tremaine* (*b*), where several authorities on the subject are collected.

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against
Pzaa.

ABBOTT C. J. There can be no doubt, that where judgment is given against the infant, he may assign his appearance by attorney as a ground of error. The law will protect an infant where a judgment has been recovered against him; but the circumstance, that the plaintiff below has been defeated in his claim against an infant, shews that he had no cause of action whatever, and therefore, that he is not entitled to judgment. It would be greatly to the prejudice of the infant, to allow the plaintiff below to avail himself of the infant's appearing by attorney as a ground of error. Unless, therefore, there be some decided case in which judgment given in favour of an infant defendant has been reversed on the ground of his infancy, we are of opinion that this judgment ought to be affirmed,

Comyn admitted, that he could not then cite any such case, but he requested further time to look into the authorities, and afterwards informed the court, that upon search, the only authorities he could find were cases in which the original judgment had been obtained against the infant.

Judgment affirmed.

(*a*) *Cro. Jac.* 289.

(*b*) *2 Saund.* 212. *a.*

1822.

REX *against* TOWNSEND.

By a clause in an inclosure act, a commissioner was authorised to stop up any way, provided it be done by the order, and with the concurrence of two justices, and that order was to be subject to an appeal in like manner, and under such form and restrictions as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved was to be at liberty to appeal at any time within six months after the cause of complaint. Under this act, the commissioner, with the concurrence and order of two justices, stopped up a road without giving the public notices required by the 55 G. 3. c. 68.: Held, that a party aggrieved might, under

these circumstances, appeal at any time within six months.

Quere, whether it be necessary to give such notices where roads are stopped up under the provisions of an inclosure act.

BY 55 G. 3. c. 43. s. 15., (an act passed for inclosing lands in the parish of *Hartlebury*, in the county of *Worcester*,) the commissioner thereby appointed was authorised to stop up, alter, or change any old carriage road, bridle way or footpath, passing or leading through any of the old inclosures within the said parish, provided that no such carriage road, bridle way or footpath, leading through any of the old inclosures of the said parish, should be stopped up, altered or changed without the concurrence and order of two justices of the peace, and which order should be subject to an appeal to the quarter sessions for the county of *Worcester*, in like manner, and under such forms and restrictions as if the same had been originally made by such justices. By section 36., any person thinking himself aggrieved by any thing done in pursuance of the act, was to be at liberty to appeal to the general quarter sessions of the peace, which shall be holden for the county of *Worcester*, within six months next after the cause of complaint should have arisen. Under this act the defendant was appointed commissioner, and on the 17th August, 1820, made an order with the concurrence of two justices of the peace for the county of *Worcester*, for stopping up a certain footpath leading through the old inclosures. Against this order, one *S. Bateman*

appealed

appealed at the *Epiphany* sessions, 1821, and the order was quashed. It was contended on behalf of the defendant at the sessions, that the Court had no jurisdiction, because, by the 55 G. 3. c. 68. an appeal against a similar order of two justices must be to the next sessions, but the counsel for the appellant urged, that the quarter sessions had jurisdiction, unless it could be shewn, that due notices of the order for stopping up the footway had been given, as required by the 55 G. 3. c. 68., previously to the *Michaelmas* sessions, 1820; and the court of quarter sessions required the defendant to prove, that such notice was given previously to those sessions, and that not being proved, they heard the appeal, and quashed the order. This order of sessions having been moved into this court by certiorari, a rule nisi was obtained for quashing it, for insufficiency, on the ground, that the appeal ought to have been to the *Michaelmas* sessions.

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Campbell now shewed cause. The appeal against this order is governed by the same rules as if it were an original order of magistrates for stopping up or diverting a footpath. It was finally settled, in *Rex v. Justices of Staffordshire* (a), that, under the general highway act, 13 G. 3. c. 78., such an appeal must be to the next sessions after the order made, whether any notice was given or not. This operated as a great hardship upon individuals aggrieved by the order, who might not have any notice; and the 55 G. 3. c. 68. s. 2., which passed the same day as the *Hartlebury* inclosure act, requires, in the case of stopping up any footway, that a notice shall be affixed by the side of the way, &c., and also

(a) 3 East, 151.

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inserted in a county newspaper for three weeks after the making of the order, and that a like notice shall be affixed to the door of the parish church, on three successive *Sundays*, and then that the order shall, at the quarter sessions which shall be holden next after the expiration of four weeks from the first day on which the notices shall have been published, be confirmed; and then, by section 3., an appeal is given to any party aggrieved at the said quarter sessions. Now, as in this case no notices of the order for stopping up the way were given before the *Michaelmas* sessions, the appeal to the *Epiphany* sessions was therefore in time. Besides, at any rate the appeal was in time within the 36th section of the local act, which allows it at any time within six months after the party was aggrieved. Here the order was made on the 7th *August*, and the footpath, in point of fact, was not stopped up till *October*.

W. E. Taunton and *Puller*, contra. This is not a proceeding under the highway act, but the road was here stopped up by a commissioner, under an inclosure act. The highway acts have no relation to the proceedings under inclosure acts, and therefore the notices required by those acts for stopping up roads, are wholly inapplicable to such a case as the present. It certainly has not been usual, where roads have been stopped up under inclosure acts, since the passing of the 55 G. 3. c. 68., to give the notices required by that act. If in this case such notices were necessary, no road, under an inclosure act, has been legally stopped up since *June*, 1815. Besides, if an inclosure commissioner be bound by part of the 2d section of 55 Geo. 3., which relates to notices, he is equally bound by the other part, which prescribes,

prescribes, that the justices shall make the order, upon view, and at a special sessions, but the commissioner cannot compel the justices to take a view, or to hold a special sessions, or to give the proper notice thereof, which is necessary. *The King v. Justices of Worcestershire.* (a) The appeal can only be under section 15. of the local inclosure act, according to the rule of construction, "that subsequent clauses which are general, shall, in deeds, be governed by precedent clauses, which are particular." *Thomas v. Howell.* (b) *Altham's case.* (c) The 36th section, then, is wholly out of the case here. The 15th section is nearly copied from the appeal clause in the general inclosure act, under which the appeal must have been to the next sessions. (d) But if an appeal conformable to the 15th section was impracticable, in consequence of an alteration effected by 55 G. 3. c. 68., it follows that there could be no appeal at all, and the sessions had no jurisdiction.

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ABBOTT C. J. I am of opinion that this rule ought to be discharged. By the 15th section of the inclosure act, the appeal is to be to the quarter sessions, in such manner and under such forms and restrictions, as if the order had been originally made by two justices. The act clearly contemplates an order afterwards to be made. To what sessions then must the party have appealed, if the original order for stopping up the road had been made by two justices? By 55 G. 3. c. 68., the appeal against such an order must have been not to the next quarter sessions after making the order, but to the ses-

(a) 2 Barn. & A. 228.
(c) 8 Rep. 308.

(b) 4 Mod. 69.
(d) 41 Geo. 3. c. 109. s. 8.

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sions that should be holden next after the expiration of four weeks from the first day on which the notices therein required were published. In this case no notices were ever published, and, therefore, if the order in question had originally been made by two justices, the appeal could not have been to the *Michaelmas* sessions. The mode of appeal therefore pointed out in the 15th section was rendered impracticable, by the omission to give the notices required; but notwithstanding that omission, a party might be aggrieved by the stopping up of the road; and yet, according to the argument, if the 36th section is to be controlled by the 15th, he could have no appeal whatever, until the notices were published, which might not happen. I do not, however, mean to pronounce any decision, whether it be incumbent upon a commissioner, in the case of stopping up a way, under an inclosure act, to give the notices required by the 55 G. 3. c. 68. But at all events, those notices not having been given in this case, I am of opinion, that the mode of appeal pointed out in the 15th section having become impracticable, the party aggrieved was entitled to appeal, at any time within six months. This rule, therefore, must be discharged.

Rule discharged.

1822.

Sir THOMAS STANLEY, Bart. *against* FIELDEN,
Esq. CONGREVE, Esq., and TOPHAM.

TRESPASS for seizing and taking the plaintiff's oxen, and detaining them for two days, until the plaintiff paid 31*l.* 5*s.* to regain them. Plea 1st, not guilty; 2dly, justification under a warrant of distress, to levy the sum of 29*l.* 5*s.*, due from the plaintiff, which had been assessed upon and demanded of him, as a composition in lieu of the statute duty that he was liable to perform, as occupier of lands in the township of *Hooton*. Replication, that the defendants committed the trespasses of their own wrong. At the trial at the spring assizes for the county of *Chester*, 1821, it appeared that the cattle, for the detention of which this action was brought, were seized by the defendant, *Topham*, under a warrant of distress, granted by *Fielden* and *Congreve*, who were magistrates acting for the hundred of *Wirral*, in the county of *Chester*. The warrant was to levy a sum of money for the proportion of statute duty due from the

Two magistrates authorised the surveyor of a turnpike road which ran through twenty-nine townships, to collect for the repair of the road a composition in lieu of the statute duty. The surveyor was not examined upon oath as to the necessity of the composition. He afterwards made an assessment of six-pence in the pound upon the annual value of the lands of a particular township through which the turnpike road passed. The sum to be collected under

the assessment was the utmost which the surveyor of the turnpike roads could in any case demand from the inhabitants of the township, and much exceeded what was required to put that part of the road lying in the township into complete repair. The turnpike surveyor having returned the assessment to the surveyor of the highways of the township, directed him to collect the sums therein mentioned. Upon a refusal to pay the sum assessed by an inhabitant of the township, two magistrates granted a warrant of distress to levy the same: Held, that the warrant was bad, the magistrates having no jurisdiction whatever, upon the ground that, in order to legalise the demand under the assessment, it ought to have been previously ascertained how many days statute duty would be required to put the road into complete repair, the composition being demandable only in respect of that number of days statute duty.

Semblé, that in order to justify two magistrates in granting an authority to collect a composition in lieu of statute duty, it should be made to appear upon oath, to both the magistrates present, that the road can be more effectually repaired by such composition.

Semblé, also, that where the composition is to be collected in several townships, it ought to appear on the face of the authority itself, that, in the judgment of the magistrates, a composition, in lieu of statute duty, is advisable in each particular township.

plaintiff,

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 against
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plaintiff, as owner of lands in the township of *Hooton*. It was given in evidence on the part of the plaintiff, and was as follows: "Whereas, by an assessment made upon the occupiers of lands, &c, within the township of *Hooton*, in the district and hundred of *Wirral*, in the county of *Chester*, for the purpose of raising a composition in money, in lieu of the statute duty in kind, for the maintenance and repair of such part of the road and highway leading from the city of *Chester*, to the *Woodside Ferry*, in the township of *Birkenhead*, in the county of *Chester*, as is situate within the township of *Hooton*, pursuant to an order or authority of two justices, acting for the said district and hundred, for that purpose, according to the directions of the statute in that behalf: Sir *T. Stanley*, Bart. was charged the sum of 29*l*. 5*s*., as his share and proportion of the said assessment, in respect of the lands, &c. which he occupied within the township of *Hooton*; and whereas, it appearing to *R. Congreve* and *J. Fielden*, Esqrs., being justices of the peace, for the county of *Chester*, acting for the district and hundred of *Wirral*, upon the application of *J. Johnson*, one of the surveyors of the highways of the township of *Hooton*, that the said sum of 29*l*. 5*s*. had been duly demanded from the plaintiff, and that he had refused to pay it for the space of ten days after such demand made: they, the said *R. Congreve* and *J. Fielden*, did summon the said Sir *T. Stanley* personally to appear before them and other justices, to be assembled at a special sessions to be holden for the said district, and at a place and time therein mentioned, to shew cause why he refused to pay the said sum; and whereas at a special sessions, now holden for the hundred of *Wirral*, at the place therein mentioned, before them, the said

Sir

Sir *T. Stanley* had not appeared, pursuant to the summons, they, the said *J. Fielden* and *R. Congreve* adjudged him liable to pay the said sum, and, therefore, they commanded all constables, &c. to levy the same by distress, &c., together with the expenses of the distress. It was objected by the counsel for the defendants, on the plaintiff's case being closed, that there ought to be a nonsuit, inasmuch as the warrant must be considered *prima facie* evidence of all the facts therein stated, and if so, then it appeared, that by an assessment pursuant to an order of two justices, according to the directions of the statute, the plaintiff was charged with the sum therein mentioned, and refused to pay it, and that this must be taken to be an adjudication, binding and valid, until regularly quashed. The learned Judges refused to nonsuit the plaintiff, but reserved the point, and the cause proceeded. On the part of the defendants the following facts were proved. *Crackenthorpe*, the surveyor of the turnpike-road, between the 29th September and 8th October, 1819, applied to the clerk of the magistrates for an authority, in writing, to empower him to call for a composition in money, in lieu of the statute duty. On the 8th October, a special sessions were held, at which *Congreve*, one of the defendants, and *William Wilson Currie*, acting justices for the district of *Wirral*, attended, and *Crackenthorpe*, the turnpike surveyor, was present, but was not examined upon oath or otherwise; and then *Congreve* and *Currie* signed the following authority in writing. "It having been made appear to us, two of his Majesty's justices of the peace, acting within and for the district and hundred of *Wirral*, in the county of *Chester*, by *Harvey Crackenthorpe*, the

surveyor

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surveyor of the turnpike-roads from the city of *Chester* to the *Woodside Ferry*, in the township of *Birkenhead*, in the county of *Chester*, and from the said city to the Assembly House in *Park Gate*, in the township of *Great Neston*, in the said county, and from *Great Neston* to *Woodside Ferry*, and from the road leading from the city of *Chester* to *Park Gate* aforesaid, to the road leading from the same city to the said *Woodside Ferry*, that the maintenance and repair of the said roads can be more effectually carried on by a composition in money than by a performance of the statute duty in kind; we do hereby authorize the said *Harvey Crackenthorp* to require such composition, in money, in lieu of the whole statute duty, from the several persons who are bound by law to perform such statute duty;" and they fixed the rates of composition, for a cart and three horses, one driver, and one labourer, by the day, at 8s. 4d. On the 12th *October*, 1819, *Johnson*, the surveyor of the highways of the township of *Hooton*, received from *Crackenthorp*, the surveyor of the turnpike-road, a demand in writing of a list of the several persons liable to statute duty in that township, and an account of the yearly value of the lands, &c. which they respectively occupied. On the 27th *October*, *Johnson* returned the list required to *Crackenthorp*, and in that return the plaintiff was mentioned as the owner and occupier of lands and tythes of the yearly value of 1170*l.* The turnpike surveyor then made an assessment upon the whole annual value, of 6*d.* in the pound, the plaintiff's proportion of which was 29*l.* 5*s.* This assessment was made on the assumption that three days' statute duty was required to repair the roads

roads in the township. (a) The whole line of road, for the repair of which the composition was required, was forty miles in extent, and passed through twenty-nine townships. At the time the demand was made upon the plaintiff, that part of the turnpike-road which passed through the township of *Hooton*, and which was only fifty-nine yards in length, was in perfect repair, and in *March*, 1820, the turnpike surveyor offered to return 26*l.* of the sum levied, and stated at the time, that in the course of that year only 3*l.* had been expended in repairing the road in that township. Mr. *Currie* the magistrate, who, as well as the defendant *Congreve*, had signed the authority to collect the composition, proved, that he had frequently conversed with *Crackenthorpe* on the necessity of having a composition before the authority was signed, and that he had desired the clerk to the magistrates to come prepared with an authority, that he had expressed his approval of the measure, that he had frequently conversed with *Congreve*, and that they were agreed upon the expediency of the measure; the subject was within their own knowledge, and they therefore signed the authority. Upon these facts the Chief Justice stated to the jury, that upon the evidence, it had not been made to appear by the surveyors of the roads to the justices, that a com-

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(a) By the 54 Geo. 3. c. 109. s. 5. the rate of composition, in lieu of statute duty, for every twenty shillings annual value, is to be a fiftieth part of the sum fixed by the justices as the composition for one day's labour of a cart and three horses and two able men. In this case that sum was eight shillings and four pence, of which two-pence was the fiftieth part; and the whole statute duty being six days for every 50*l.* annual value, one shilling in the pound would be the sum required. But by the local turnpike act, the trustees of the turnpike road were entitled to require only three days' statute duty from the several townships through which the road ran, the composition for which would, of course, be sixpence in the pound.

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position in lieu of statute duty was necessary; that the surveyor ought at all events to have been examined in the presence of both the magistrates, whereas in fact one only had examined him, and communicated the information to the other; and as the result of the enquiry was to affect the property of many persons, it was fit that, (if not on oath), it should at least be of a satisfactory nature. The jury found a verdict for the plaintiff. A rule nisi for a nonsuit or a new trial having been obtained by *J. Williams* in last *Easter* term; first, upon the ground taken at the trial, that the warrant contained *prima facie* evidence of the jurisdiction of the magistrates, and therefore, that there ought to have been a nonsuit. Secondly, that there was evidence given on the part of the defendant, to shew that it had been made sufficiently to appear to the justices by the surveyor, that a composition was necessary instead of statute duty: and thirdly, that at all events the defendant *Fielden* was entitled to a verdict, inasmuch as he had not signed the authority to the surveyor to collect the composition, but merely the warrant, and that he was justified in so doing, by the documents referred to in the warrants. At the time of granting the rule, the Lord Chief Justice said, that it was important that justices should know the mode in which they are to exercise their authority. At the same time, the opinion of the Court was then very strong, that wherever an act of parliament required justices to take certain steps on some matter being made to appear to them, that matter must be made to appear to them on oath.

Cross Serjt., now shewed cause. The warrant which was given in evidence on the part of the Plaintiff, merely to

to connect the justices with the act of the officer; cannot be taken to be in itself an adjudication; and there was not any other formal adjudication. Besides, the warrant itself was a nullity, inasmuch as in order to give jurisdiction to the two justices who signed the authority, it should have been "made to appear" to them in a formal manner, that the maintenance and repair of the roads could be more effectually carried on by a composition in money, than by a performance of the statute duty in kind. Now; that "making to appear" should have been upon a regular information laid before the justices; and, secondly, by the examination of witnesses upon oath. In the present instance, there was neither information nor oath. The whole proceeding therefore was ~~certain~~ non judicis; and the order by the two justices being without jurisdiction, could be no justification to the two defendants who signed the warrant. The distress was also illegal upon another ground. Supposing this to have been a case in which it was proper to have a money composition in lieu of statute duty in kind, it was necessary first to ascertain what quantity of statute duty in kind would have been necessary under the circumstances. Although the act of parliament fixes a maximum; yet it does not appear what smaller proportion of the statute duty might have been sufficient, and the first step should have been to have settled that amount.

D. P. Jones and J. Parke; in support of the rule. There is no ground whatever for maintaining the verdict, *as against Fielden.* By the acts of parliament it is not required, that the justices signing the warrant should be the same justices as those who signed the ori-

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ginal authority; and, in the present instance, *Fielden* had not, in fact, interfered in any antecedent stage of the proceedings; he was justified in presuming that the previous measures were correct in point of form, the plaintiff having never appealed, though a demand had been formally made upon him, and also a summons issued, to which he did not appear. It would be too much to make *Fielden* responsible for signing the warrant, even supposing that the justices who signed the authority had acted upon imperfect or informal evidence. He was not bound to enquire upon what evidence they had acted, nor had he the power, in point of law, of quashing or revising their adjudication. But, secondly, the verdict ought not to stand against either of the defendants. The warrant which was proved on the part of the plaintiff entitled the defendants to a nonsuit. It imports an adjudication, such as the statute required; and an unimpeached subsisting conviction or adjudication cannot be questioned in the form of an action of trespass. *Massey v. Johnson*(a), *Strickland v. Ward*. (b) Supposing, however, the warrant not to be conclusive as an adjudication, the proceedings which were given in evidence were sufficient to support it. The stat. 54 G. 3. c. 109. embodies the provisions of the 13 G. 3. c. 78., and, according to the 81st section of that statute, the plaintiff should have appealed, if there were any ground of complaint; and it is expressly provided, that no proceedings shall be quashed for want of form, or shall be removable by certiorari. If the plaintiff had appealed, he must have done so within a limited time, whilst the evidence was fresh, and the measures in the

(a) 12 East, 67.

(b) 7 T. R. 651.

execution of the act were just commencing; whereas, if trespass can be maintained, no lapse of time will sanction the order of the justices. Upon an appeal, too, the plaintiff must have stated some specific objection, whereas, by the present action, he casts it upon the defendants to prove and maintain every step of the proceedings. As to the next point, it appears, upon the evidence, that information was laid before the magistrates by the surveyor, and it was not necessary, under this act of parliament, that there should be evidence upon oath. The very language of the act, which is, "*made to appear*," not "*proved*," as is found in other acts, seems to shew, that the legislature did not intend to make it imperative upon the justices to require evidence upon oath; and the reason of the difference is apparent. That which was to be made to appear was not a simple matter of fact, as in ordinary cases, but was a matter of judgment, as to the expediency of having a money composition in lieu of statute duty in kind.

This was a matter of speculation, depending upon the state of the roads, the price of labour, the supply of materials, and, generally, the circumstances and state of the neighbourhood. In such a case, therefore, the justices were authorised in acting upon their own knowledge, or upon what appeared to them to be satisfactory information. Here, in fact, they had communicated together, and it was not necessary that the information of the surveyor should be laid before them whilst sitting together. They subsequently exercised a joint judgment, which was sufficient. *Battye v. Gresley.* (a) But, supposing that the surveyor ought to have communi-

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(a) 8 East, 527.

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cated his information to the two justices together, at most the order was not void, but voidable, and could only be avoided upon appeal. *Rex v. Inhabitants of Stofield.* (*b*) As to the last objection, it was clear, from the evidence, that the surveyor considered, that the whole statute duty in kind, which by the act he was empowered to call for, was necessary for the repair of the main line of road, together with the lateral branches; and it is evident, that the amount of the composition in money was calculated upon that principle. If the demand was excessive, and not required by the state of the road, the plaintiff should have appealed: but, in the present stage of the proceedings, it must be taken that the whole of such duty, if performed in kind, would have been necessary, the calculation of the composition in money shews what was intended; the rate of commutation was regularly fixed by the justices, and promulgated according to the provisions of the act.

ABBOTT C. J. I am of opinion that enough has not been done to legalize the demand of this specific sum of money from the plaintiff. It appears from the evidence, that there had been an adjudication of two magistrates that a composition should be paid in lieu of statute duty in kind, and also an adjudication by which the composition was fixed to be at the rate of 8s. 4d. for a cart, three horses, a driver, and a labourer. Before, however, it can be ascertained how much any individual ought to pay as a composition in lieu of statute duty, it must be ascertained in some manner and by some competent authority how many days' labour will be required

(a) 4 T. R. 596

to repair the road. Now, that certainly has not been done here, in distinct terms, in this case. It appears upon the evidence, that the turnpike surveyor having first required, from the surveyor of the highways of the township, a list of the several persons liable to statute duty, made an assessment at the rate of sixpence in the pound upon the whole annual value returned. He seems to have taken it for granted that he was entitled to require from the several townships through which the road passed, a composition for the whole statute duty which, by law, he was entitled to demand, whatever the state of the roads might be. Now, I am of opinion, that he had no such right. If there were no composition, the inhabitants of the several townships could only be called upon to do so many days' statute duty as would be absolutely necessary for the repair of the roads; and if a composition be called for instead of the statute duty, that composition ought to be an equivalent for that number of days' statute duty. I think, therefore, in this case, that before the demand was made upon the plaintiff, it ought to have been ascertained, by persons having competent authority for that purpose, that so many days' statute duty would be required to put the road in question into a complete state of repair, and that it ought to have been notified to the inhabitants of the parish or township, that the composition required of them, of sixpence in the pound upon the annual value of their lands, was calculated upon the principle that it would require so many days' statute duty to repair the road. That not having been done in this case, I think, that the justices had no authority whatever to issue the warrant, and consequently that this rule must be discharged,

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against
FIELDER.

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against
FIELDEN.

BAYLEY J. I am of opinion, that the verdict in this case is right, as against both the magistrates. A magistrate is not to be answerable for granting a warrant, if at the time of granting it he has documents before him (which are the acts of other magistrates) from which it appears he was justified in granting the warrant. But if the want of jurisdiction is manifest from all the proceedings before him at the time, then he grants the warrant at his peril. Here, on the face of the original authority to collect the composition, there is a defect, which must have been obvious to the defendants. The composition allowed by law in lieu of statute duty, is in lieu of the statute duty required of each particular township, in respect of the roads in that township. The money to be raised, in this case, is not to constitute one general fund for the entire line of turnpike-road, but is specifically to be applied for the repair of that part of the road in the particular township. I think, that the magistrates ought, in the exercise of their discretion, on the face of the authority itself, to have shewn, that in their opinion, in each particular township, a composition in lieu of statute duty was adviseable. Here, upon the face of this authority, they do not appear distinctly to have exercised any such discretion, because they have only stated that the maintenance and repair of *the said roads* can be more effectually carried on by a composition in money than by a performance of the statute duty in kind. I therefore think, that there was a defect in the authority itself, which Mr. *Fielden* had an opportunity of observing. I also strongly incline to think, though, upon that point, I do not mean to intimate any decided opinion, that it should be made to appear *upon oath* to both the magistrates present that a composition was adviseable,

viseable. The ground, however, upon which I pronounce my judgment in this case, is this, that assuming the magistrates to have said, that there ought to have been a composition in this particular township for the repair of the roads there in lieu of statute duty, (which the warrant assumes them to have said,) I think that it should have been made to appear what the quantum of the composition was to be. That is in no respect ascertained as it ought to have been. It has been insisted, that the communication made to *Johnson* by *Crackenthorpe*, that he required a composition calculated at 6d. in the pound, was an intimation, that he considered the whole of the composition to be requisite for the repair of the roads in that particular township. From the evidence in this case, I do not believe that *Crackenthorpe* ever exercised any judgment upon that point. He seems to have considered the whole sum collected to be one entire fund for the repair of the whole of the roads, and to have meant to collect in each township, to the utmost extent which by law he could collect. I am of opinion, that the communication by *Crackenthorpe* to *Johnson* of itself was not sufficient, but that it ought to have been notified to the inhabitants of the parish or township, that, in the judgment of the surveyor, it was necessary that there should be a composition in lieu of so many days' team work, in order that the parishioners might have had the opportunity of contesting the claim made upon them. That not having been done, I am of opinion, that there was not any evidence before Mr. *Fielden* to justify him in granting this warrant, because, there never has been an assessment duly made, and duly notified to the inhabitants of the parish. This rule must therefore be discharged.

1822.

STANLEY
against
FIELDEN.

HOLROYD

CASES IN HILARY TERM

1822.

STANLEY
against
FISHERMAN,

HOLROYD J. I am also of opinion, that the verdict is right against both the magistrates, on the ground last stated by my Brother Bayley. I think, that there was not sufficient evidence before the magistrates to authorise them to grant a warrant. There was no valid assessment so as to bind any person to the payment of any specific amount of composition, the number of days' statute duty required for repairing the road, not having been ascertained or notified to the parish; and therefore, sufficient was not done to legalize this demand made upon the plaintiff. The magistrate, therefore, had no right to grant the warrant.

Rule discharged. (a)

(a) Best J. was absent at Chambers.

January 28d, 1822.

On the first day of this term, *William Elias Taunton, Christopher Puller, William George Adam, Launcelot Shadwell, and Edward Burtenshaw Sugden*, of *Lincoln's Inn*, Esquires, took their places within the bar, as his majesty's counsel learned in the law.

1822.

WALTER against SMITH.

Thursday,
January 24th.

TROVER for a gold watch, a watch key and two gold seals. Plea not guilty. At the trial before Abbott C. J., at the London sittings after last Michaelmas term, it appeared that the plaintiff, on the 22d January, 1820, had pledged the articles mentioned in the declaration, with the defendant, who was a pawnbroker, resident at Bristol, and that the plaintiff did not require the defendant to return them until after the expiration of one year and a day from the time they were pledged. And the defendant then refused to return them, asserting that they had become forfeited in consequence of the year having expired. The plaintiff at the time of the demand, tendered to the defendant the amount of the principal and interest due in respect of the money advanced. At the time when the demand was made, the articles pledged remained in the possession of the defendant. They were subsequently sold by auction, and the defendant himself became the purchaser. At the trial, the Lord Chief Justice was of opinion, that under these circumstances, the plaintiff was entitled to recover; the act of the 39 and 40 G. 3. c. 29., not vesting the property absolutely in the pawnbroker after the expiration of a year and a day, but only giving him a power to sell, in order to reimburse himself his principal and interest. The jury found a verdict for the plaintiff. And now,

A pawnbroker has no right to sell unredeemed pledges after the expiration of a year from the time the goods were pledged, if the original owner tender him the principal and interest due.

Gurney moved for a new trial, and contended, that, by the 39 and 40 G. 3. c. 29. s. 17., the property in

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SMITH.

the unredeemed pledges, after the expiration of the time mentioned in the statute, vested in the pawnee. That section prescribes, that all goods which shall be pawned or pledged, shall be deemed *forfeited*, and may be sold at the expiration of one whole year, exclusive of the day whereon the goods and chattels were so pawned as aforesaid; and that all goods and chattels so forfeited, of a certain value therein mentioned, shall be sold by public auction. Now, in order to give effect to the word "*forfeited*," the original owner must be taken to have absolutely lost his right to the goods. By s. 19. it is enacted, "that in case any person entitled to redeem goods in pledge, shall, before or upon the expiration of one year, from the time of pawning the same, give notice to the person having the same in pledge, not to sell the same at the end of the said one year, then such goods shall not be sold or disposed of, until after the expiration of three calendar months, to be computed from the expiration of the said year, during which term the owner of the goods shall have liberty to redeem the same." Now, by the legislature expressly reserving to the owner the liberty to redeem the same upon the terms mentioned in that section, they must have considered that the owner's right to redeem would have been otherwise extinguished.

ABBOTT C. J. I think that we cannot give to the word *forfeited*, as used in this act of parliament, the effect contended for by the defendant. It is argued that its import is, that the party whose property is said to be forfeited, has absolutely lost all right to it. Now it is manifest, from the other provisions of this act of parliament,

ment, that, after the time for redeeming the property pledged is expired, the whole interest is not divested out of the original owner. If it were, the sale would be entirely for the benefit of the pawnbroker; but, by the 20th section of the act, it is provided, "that with respect to goods pawned for more than 10s., if they shall be sold for more than the principal money and profit due thereon at the time of such sale, the overplus shall, by the pawnbroker, be paid on demand to the pawnier, in case the demand shall be made within three years after such sale, the necessary costs and charges of such sale being first deducted." The pawnbroker, therefore, is only to derive from the sale so much as will reimburse him for his principal and interest, and the expenses of the sale, and the overplus, if any, is to be returned to the owner. We cannot, therefore, consistently with this provision, give to the word *forfeited*, as used in the 17th section, the sense contended for on the part of the defendant. I am of opinion, that if the pledge be not redeemed at the expiration of a year and day, the pawnbroker has a right to expose it to sale as soon as he can, consistently with the provisions of the act; but if, at any time before the sale has actually taken place, the owner of the goods tender the principal and interest, and expenses incurred, he has a right to his goods, and the pawnbroker is not injured; for the power of sale is allowed him merely to secure to him the money which he has advanced, together with the high rate of interest which the law allows to him in his character of pawnbroker. For these reasons I am of opinion, that no rule ought to be granted.

1822.

WALTER
against
SMITH.

BAYLEY

CASES IN HILARY TERM

1822.

WALTERS
against
Sawyer.

DAYLEY J. I am of the same opinion. The object of the sale is, to enable the pawnbroker to reimburse himself for the amount of the principal money advanced, and the interest due thereon. And if, before the sale takes place, the party pledging pays the pawnbroker his principal and interest, and expenses incurred; all the purposes of a sale are answered, and, consequently, the pawnbroker, in such a case, can have no right to sell. The words "deemed forfeited and may be sold," mean not that the things pledged shall become the absolute property of the pawnbroker, but only that they shall be so far forfeited as that the pawnbroker may take steps towards a sale. I think, therefore, that the owner having tendered to the pawnbroker all the money that he would be entitled to take by sale, he has no right to sell; and, consequently, that the plaintiff is entitled to recover.

HOLKED J. I think that, by the 17th section, the property is not to be considered forfeited to all intents and purposes, but only for the purpose of enabling a sale to be had, by which the pawnbroker may pay himself his principal, and the profit which the law allows him to make in lieu of interest. Now the sale is for the benefit of the owner as well as of the pawnbroker, for, if the property pledged sells for more than the principal and profit allowed to the pawnbroker in lieu of interest, he is accountable to the owner. The latter, therefore, continues to have an interest in the property, and must have a right to redeem it, by paying to the pawnbroker all that he would be entitled to derive out of it by a sale. It is true, that by the 17th section,

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the goods are forfeited for the purpose of sale; but that purpose is fully answered by the pawnbroker's being paid the amount of what is due to him upon the pledge. In this case a tender to that amount has been made to him, and therefore he had no right to put the owner to the burdensome and unnecessary expenses of a sale. I think, therefore, that no rule ought to be granted.

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WALTER
against
SMITH.

BEST J. I am of the same opinion. The legislature never could have intended to use the word forfeited in the 17th section of this act, in the sense which is contended for by the defendant. That word generally means, the taking away all right from one person, and transferring all right to another. The words are, here, "that it shall be deemed forfeited, and may be sold." It is manifest, however, from the provisions of the act, that it is to be sold for the benefit of the person to whom it belongs, after securing to the pawnbroker his principal and interest; for the latter is directed to account to the original owner for the overplus, if any. It is clear, therefore, that the legislature did not intend wholly to transfer the interest of the original owner of the thing pawned to the pawnee; and, therefore, the word forfeited, as used in this section, cannot have the sense contended for. It would be absurd to hold, in this case, that the pawnbroker had a right to sell, for by the sale, he could be entitled to no greater benefit than he would have received by accepting the sum tendered, which was the full amount of the principal and interest due. I think, therefore, that this rule ought not to be granted.

Rule refused.

1822.

*Thursday,
January 24th.*

DARWIN *against* LINCOLN and LOCK.

By the 53 G. 3.
c. 141. the me-
morial of an
annuity must
contain the de-
scription and
place of resi-
dence of the
witnesses to the
annuity deed.

A mere
surety who
charges with
the payment of
an annuity his
estate in fee
simple of which
he was seized
in possession at
the time of
granting the
annuity, and
which was of
greater annual
value than the
annuity, is a
grantor within
the meaning of
the 13 Geo. 3.
c. 26. s. 8. and
therefore in
such a case no
memorial is
required.

ACTION on a bond, dated 31st *August*, 1818, for 6000*l.*, the condition of which was set out in the declaration, and recited an indenture of the 23d *December*, 1812, between the defendant, *Lincoln*, of the first part, the plaintiff of the second part, *John Birkett*, therein described as of *Cloak-lane London*, gentleman, of the third part, and *Henry Birkett* of the fourth part, by which *Lincoln* granted to *John Birkett* an annuity of 200*l.* during the lives of three persons therein mentioned, and the same was made chargeable upon, and issuing out of certain premises therein described, and for better securing the annuity, the premises were demised to *Henry Birkett* for a term of 500 years, in trust to pay the annuity, if in arrear. The condition then recited another indenture of the 19th *June*, 1815, made between the same parties, by which the plaintiff, at the request of *Lincoln*, charged the same premises with the payment of another annuity of 100*l.* to *John Birkett*, for the lives of four persons therein mentioned, and the life of the survivor; and for better securing the payment of both these annuities, the plaintiff joined with the defendant, *Lincoln*, in two bonds and warrants of attorney to *John Birkett*, in the two several sums of 4000*l.* and 2000*l.* It then recited, that he joined in the said grant and other securities, as surety only for *Lincoln*, and that the premises chargeable with the payment of the annuities, were the sole property of the plaintiff, and as an indemnification of the plaintiff against any loss by reason of his having become

surety

surety, *Lock*, the other defendant, agreed to enter into a joint and several bond to the plaintiff. The condition of the bond was then declared to be for the due payment of the annuities by *Lincoln*, and in case of his default, that both the defendants should indemnify and save harmless the plaintiff. The breach assigned was, that on the 19th *December*, 1820, two quarterly payments of the annuity of 200*l.* became due, and that on the 23d *December*, 1820, two quarterly payments of the annuity of 100*l.* became due; that defendant, *Lincoln*, did not pay the same, and that the plaintiff thereby became liable and paid. The defendant, *Lincoln*, pleaded his bankruptcy. It is unnecessary to state all the pleas, inasmuch as the questions discussed were fully raised by the issues taken on the third plea. That plea was substantially as follows: As to the annuity of 200*l.*, that the memorial was defective in not stating a clause, whereby *Lincoln* and the plaintiff were at liberty to purchase the annuity upon certain conditions therein mentioned. And as to the annuity of 100*l.*, that the memorial was defective in not stating the addition and place of residence of the subscribing witness to the annuity deed. It appeared by the memorial which was set out in the plea, that *Peter Downs*, one of the subscribing witnesses, was described merely as the clerk of Mr. *Birkett*. Replication as to so much of the plea as related to the arrears of the annuity of 200*l.*, that that annuity, at the time of the granting thereof, was secured upon freehold premises in the condition of the bond mentioned, which were then of equal or greater annual value than the annuity of 200*l.*, and of which the plaintiff, then being one of the grantors of the said annuity, was then seised in fee simple in possession.

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Upon this issue was taken and joined. Replication as to so much of the third plea as related to the arrears of the annuity of 100*l.* in the last breach mentioned, that that annuity at the time of the grant thereof, was secured upon certain freehold lands in *Great Britain*, to wit, upon the freehold premises in the condition of the bond mentioned, which were then of equal or greater annual value than the said last mentioned annuity, over and above any other annuity, and the interest of any principal sums charged or secured thereon, of which the said grantors of the said annuity then had notice, to wit, of the annual value of 350*l.*, and of which said freehold messuage, tenement and premises, the said plaintiff being then one of the grantors of the said last mentioned annuity, was then and there seized in fee simple in possession. Upon this replication issue was also taken and joined. At the trial before Abbott C. J., at the *Middlesex* sittings after last *Easter* term, the jury found that the premises upon which the annuities were secured, were of the annual value of 200*l.* But that they were not of the annual value of 300*l.* On the part of the plaintiff, a rule nisi was obtained last *Easter* term, for entering up judgment for the plaintiff on the last issue non obstante veredicto, on the ground that the annuity act of the 53 G. 3. c. 141., did not require the addition and place of residence of the witnesses to the deed, to be inserted in the memorial. And on the other hand, a rule nisi was obtained on the part of the defendant, to arrest the judgment on the other issue found for the plaintiff, on the ground that the plaintiff was alleged in the pleadings to be the grantor of the annuity, whereas it clearly appeared from the recital in the condition of the bond, that he was a mere surety, and that *Lincoln* was the grantor.

granter. The Court having ordered both the rules to be brought on together; the case was now argued by

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Lincoln.

Marryat, Gaselee and Carter, for the plaintiff. The first annuity having been granted before the statute 53 G. 3. c. 141., must be regulated by the provisions of the 17 G. 3. c. 26. Now, the plaintiff is clearly a grantor of the annuity within the meaning of the 8th sec. of that statute. For he joined in the different securities, and charged his own estate with the payment of the annuity. Secondly, the 58 G. 3. c. 141. s. 2, does not require, that the description of the witness should be set out in the memorial, but merely that it should contain the names of all the parties, and of all the witnesses thereto, &c. Now here the memorial does contain the names of the parties and witnesses. And the schedule ought not to be so construed as to defeat the enacting clause. Besides, in this case, the witness is sufficiently described as the clerk of Mr. *Birkett*, and therefore, might be found at any time, if required. In *Haslope v. Thorne* (a), it was held sufficient for the plaintiff's clerk, in an affidavit to hold to bail, to state his place of abode to be the office where he is employed, though he slept at another place. Here, the witness is described in the memorial as the clerk of Mr. *Birkett*, and in the deed recited in the bond, the latter is described as of *Cloak-lane*. In *Barber v. Gamson* (b), the Court held that it was not necessary to insert in the memorial the description by place of residence, or otherwise, of the persons for whose lives the annuity was granted.

(a) 1 *Mauls & Selw.* 103,(b) 4 *Barn. & A.* 281.

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LINCOLN.~~

Scarlett, contr. The 53 G. 3. c. 141. s. 2. requires a memorial of the date of the deed, of the names of all the parties, and of all the witnesses, &c. to be enrolled in the form and to the effect following, and then follows a table, shewing what the substance and form of the memorial is to be, and under the head of ‘names of witnesses’ there is *E. F.* “of.” The table, therefore, evidently imports, that the place of residence of the witness should be inserted, and the mode given in the table of making the memorial, must be considered as incorporated in the enacting clause. Secondly, *Darwin* is not the grantor of this annuity, for he is described in the condition of the bond as a mere surety. The legislature intended to protect a party who borrowed his money upon annuity interest, and who had no marketable estate. Here *Lincoln* the borrower had no marketable estate, and he therefore was the person intended to be protected by the statute. In *Amhurst v. Skynner* (a), Lord *Ellenborough* expressed his regret, that a memorial was not required in all cases. Besides, the Court will so construe this clause as to further the remedy contemplated by the legislature, and they will therefore rather enlarge the enacting clause than the exception.

ABBOTT C. J. There is no mention of sureties in the act 53 G. 3. c. 141.; and the word grantor is only to be found in the excepting clause, and in the 7th sect. by which an alphabetical list is required to be kept of the names and residences of the grantors of annuities. In the 17 G. 3. c. 26., the word grantor is only mentioned in the excepting clause. Now, there being no express words in these acts

(a) 12 *East*, 263.

to

to shew that the word *grantor* is used in a more limited sense, I am of opinion, that a man who makes his estate liable to the payment of an annuity, is a grantor of that annuity within the meaning of both those acts of parliament, and consequently that, as far as the annuity of 200*l.* was concerned, it is a case falling within the exception of the annuity acts, and therefore, that no memorial was required. I am also of opinion, that by using the word "of" following *E. F.*, in the 53 G. S. c. 141., the legislature evidently intended, that the place of abode of the witness should be inserted. It is of great importance that that should be done, for otherwise annuity deeds might be executed in the presence of witnesses wholly unknown to the party, and he might afterwards have no means of finding them out for the purpose of obtaining their evidence as to what passed at the time of execution. I think, therefore, that the rule for arresting the judgment, and the rule for entering up judgment for the plaintiff, notwithstanding the verdict on the issue found for the defendant, ought both to be discharged.

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DAWNS
against
Lincoln.

BAYLEY J. I am clearly of opinion, that the description of the witnesses must be inserted in the memorial, and that the description given of the witness in this memorial, as the clerk of Mr. *Birkett*, is insufficient. The 53 G. S. c. 141. s. 2., does not merely require that the names of the witnesses shall be inserted in the memorial, but that they shall be inserted in the form and to the effect following, with such alterations therein as the nature and circumstances of the particular case may reasonably require; and the form is then given, and after the name of the witness, the word "of" follows. Now that word must have been intentionally

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introduced,

1893.

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Banks
against
Leverett.

introduced, and must have had some object; and I think the intention of the legislature was this, that the description of the witness should be given, in order that the party executing the deeds might be able to find the witness when required. There may be many persons of the same name, and therefore the inserting of the name alone would not furnish sufficient information. It has been said, that the description here given of the witness, as the clerk of Mr. *Birkett*, is sufficient, because, by enquiring of Mr. *Birkett*, the witness may be found. But Mr. *Birkett* may refuse to give the information: whereas, if the party has the information which the form of the schedule implies, he will be able to trace the witness. I am also of opinion, that it would be a forced construction of the excepting clause in either of these statutes, to hold, that the word "grantor" must of necessity be confined to the person for whose use the annuity is granted. These acts are extremely penal in their consequences, in avoiding the different instruments executed to secure the annuity, and I think that a surety, by making himself a grantor, satisfies the words of the statutes; and if that be so, we are not warranted, in a penal statute, in saying that he is not within its protection. Then, as this annuity was secured upon land, of which the plaintiff was seized in fee simple, and as he concurred in granting the annuity, I think that he must be considered as a grantor within the fair spirit of the excepting clause. He pledges his estate for payment of the annuity, and he can never redeem the estate without paying the whole of the money which was paid as the consideration for the annuity, and if he were willing that his estate in fee simple should be subject to that charge,

he

he had the power, at least, of substituting that estate, and of raising money upon it by way of mortgage. This is, therefore, a case in which the persons who concurred in borrowing the money were not driven to the necessity of borrowing by annuity, and that being so, I am of opinion, that it is within the meaning of the exception, and, consequently, that the annuity for 200*l.* is good. Both the rules must therefore be discharged.

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against
LINCOLN.

BEST J. I am clearly of opinion, that the memorial does not contain a sufficient description of the witness, for the act requires, that the memorial shall be in the form or to the effect mentioned in the act. Now it is here neither in the form nor to the effect there stated. The witness to the deed is described merely as clerk to Mr. *Birkett*; that is not the description which the act requires. He may be clerk for a single day, or his employer may not be disposed to give the required information. He may have an interest in withholding it. I am therefore of opinion that the rule obtained by the plaintiff must be discharged. As to the other question, I am of opinion that the plaintiff is a grantor of the annuity within the 10th section of the act, and that being so, the judgment ought not to be arrested.

Both rules discharged. (a)

(a) *Holroyd J. was absent at Chambers.*

1822.

*Friday,
January 25th.*

BEARDMORE *against* RATTENBURY.

Where, on a
plea of action
non accredit infra sex annos,
it appeared that
a writ of testatum special
capias was issued
within six years
in Michaelmas term,
and an
alias testatum
capias in Easter
term following,
but no writ in
Hilary term:
Held, that this
was sufficient
to take the case
out of the statute,
the suit being actually,
although irregularly,
commenced within
six years, and
that the continuance
in *Hilary* term
might be supplied
at any
time.

ASSUMPSIT on several bills of exchange. Plea,
action non accredit infra sex annos, and issue
thereon. At the trial, before Abbott C.J., at the *Guild-*
hall sittings after last *Michaelmas* term, it appeared, that
the action had been commenced by original; and, in
order to take the case out of the statute, the plaintiff
gave in evidence a writ of testatum special capias, issued
a short time before the expiration of the six years, and
returnable in *Michaelmas* term, 1820, and then returned
non est inventus; and, secondly, an alias testatum capias
issued subsequently to the six years, returnable in *Easter*
term, 1821. No writ or entry of a writ, returnable
in *Hilary* term, was produced in evidence. The
Lord Chief Justice thought this sufficient to take the
case out of the statute, and thereupon the plaintiff had
a verdict. And now,

Scarlett moved to set aside the verdict and to enter a
nonsuit. Here there was a discontinuance, for there
was no writ returnable in *Hilary* term. In *Harris v. Woolford* (a), it is indeed laid down, that when once a
writ is duly returned, the subsequent continuances may
be entered at any time, and that a latitat is a good
commencement of a suit; but that is on the ground

(a) 6 T. R. 617.

that

that it is the common practice of the Court to commence suits by a latitat. There is no decision, however, that a testatum special capias is a good commencement of a suit, it being the ordinary practice to sue out a capias first. Here, too, it should have been specially replied.

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RATTENBURY.

ABBOTT C. J. The question here is, not whether the suit was regularly commenced within six years, but whether it was actually commenced within that time; and although, therefore, it might be irregular to sue out a writ of testatum special capias in the first instance, still it is clear that the suit was then however irregularly commenced. Two courses were open to the plaintiff, if any objection had been taken to the regularity of his proceedings; one by applying to the Master of the Rolls for leave to sue out a prior writ, the other by applying to this court for leave to strike out the testatum part of the writ. The irregularity might, therefore, have been cured, and the action might have proceeded. A latitat, equally with a testatum special capias, supposes the existence of a prior writ, and yet that has been held to be a good commencement of a suit. If, then, this suit was properly commenced, the continuances may be entered at any time; and therefore, the supposed discontinuance is not a ground of nonsuit. A special replication was not necessary; it is necessary where the form of the plea states that the plaintiff did not file his bill within six years, because the production of a writ of latitat within six years, would not negative that fact; but here the plea states, that the action was not commenced within six years, which is negatived by the

1822.

**BEARDMORE
against
RATTEMURY.**

the production of this writ; and a general replication was therefore sufficient. There is, therefore, no ground for disturbing the present verdict.

Rule refused.

Wood against VEAL.

In trespass and justification under a public right of way, the locus in quo, which was not a thoroughfare, had been under lease from 1719 to 1818, but as far back as living memory could go, it had been used by the public, and lighted, paved, and watched under an act of parliament, in which it was enumerated as one of the streets in Westminster. After 1818, the plaintiff, who previously lived for 24 years in its neighbourhood, inclosed it: Held, that under these circumstances, the jury were well justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for 99 years, nor by any one, except the owner of the fee. Quere, whether there can be a public highway which is not a thoroughfare.

TRESPASS for breaking and entering a certain yard and close of the plaintiff in the parish of St. John, Westminster, and pulling down his fence, &c. there erected. The defendant justified the trespass under a public right of way. At the trial at the Westminster sittings, after last Michaelmas term, before Abbott C. J., it appeared that the locus in quo, which was called Little Abingdon-street, Westminster, was not a thoroughfare, but that, as far back as living memory could go, it had been used by all persons desirous of going there, and that in 11 G. 3. it had been enumerated amongst other streets in the act of parliament then passed for paving, cleaning, and lighting the squares, streets, &c. of Westminster. That the commissioners had accordingly paved and lighted it, and that watchmen had been stationed there, &c. &c. On the part of the plaintiff, it appeared that in the year 1719, a lease for 99 years of the plaintiff's premises, including the yard in dispute, had been granted by the then owner of the fee; which having expired in 1818, the plaintiff, in 1820, having for 24 years previously lived in the neighbourhood,

erected

erected the fence in question. The Lord Chief Justice left it to the jury to say, whether they thought there had been any dedication to the public previously to 1719, telling them, that in that case they ought to find for the defendant; but if not, then he told them, that there could be no dedication to the public, except by the owner of the fee; and that the permission by the tenants for 99 years would not bind the landlord; and that the circumstance of the lease for 99 years, which had been proved, explained, in a great degree, the use by the public, as not being referable to a dedication by the landlord. Under this direction, the jury found a verdict for the plaintiff. And now,

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against
VAL.

Gurney moved for a new trial. In this case the jury ought to have been directed to presume a dedication to the public. Here, as far back as living memory could go, the public had used this place, which having been originally called *Lansdowne-lane*, had subsequently acquired the name of *Little Abingdon-street*, and had been so named in a public act of parliament for lighting and paving *Westminster*. Under this act it had been lighted and paved, so that this case is stronger than that of *Rex v. Lloyd* (a), where the lighting only was held to be strong evidence of a public way. As to its being not a thoroughfare, that is not important; for Lord *Kennyon*, in the *Rugby Charity v. Merryweather* (b), held that that circumstance could make no difference. In *Rex v. Barr* (c), Lord *Ellenborough* decided that the reversioner having knowledge of the use by the public, was bound by it. Now, in this case, the present plain-

(a) 1 Campb. 260. (b) 11 East, 575. n. (c) 4 Campb. 16.

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against
REAL

tiff had, for 24 years, lived in the neighbourhood, and must have known of the public use of this street.

ABBOTT C. J. I have great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot well be in the use of it. In this case, however, I left it to the jury to consider, whether there had been a dedication to the public, telling them that a highway might exist although it was not a thoroughfare. Nothing done by the lessee without the consent of the owner of the fee would give the right of way to the public. Here, as the land was demised by the lease of 1719, which expired in 1818, it seems to me, that the proper question to consider was, whether there had been a dedication to the public before 1719, or, subsequently to that period, with the consent of the owner of the fee. I am still of opinion that the case was presented properly to the consideration of the jury, and I think they have found a right verdict.

BAYLEY J. It is not necessary to decide upon the present occasion, whether there can be a highway which is not a thoroughfare. For the point in this case is, whether, supposing that to be so, there has been a dedication of this way to the public. Now, in order to give the public that right, it must be done with the consent of the owner of the fee; for where it is given by an individual having a limited right, it can only continue for a limited period. Here, upon the evidence, it appears that the permission was given, if at all, by the lessee for 99 years. I think, therefore, that the case

was

was properly left to the jury, and that they have found a proper verdict.

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V.R.A.L.

HOLROYD J. I am of the same opinion. The opinion of Lord Kenyon in the *Rugby Charity v. Merryweather*, is somewhat shaken by the observations of Lord C. J. Mansfield in *Wooldyer v. Hadden*. (a) But it is not necessary to determine that question here, for this case has been determined upon principles which assume the case of the *Rugby Charity v. Merryweather* to be good law.

BEST J. I am quite satisfied with the verdict which the jury have found in this case, and with the manner in which the question was left to them. No man has a greater respect for the learned judge who decided the case of the *Rugby Charity v. Merryweather* than I have, but I think that that decision was a departure from principles usually received in the law. If a road be for the accommodation of particular persons only, it is not a public road, and, therefore, I can see no reason why the inhabitants in a street which is not a thoroughfare should not put up a fence at the end of it and exclude the public. It is not, however, necessary to decide that question in this case, because, independently of it, the plaintiff was entitled to the verdict.

Rule refused.

(a) *5 Term. 142.*

1822.

Tuesday,
January 29th.

DOE on the Demise of SPENCER against CLARK.

A testator devised a copyhold estate to his wife for life, remainder to his son, and the heirs of his body, and there was no custom in the manor to entail copyholds; the son survived his mother, and had issue, and having become bankrupt, he died before admittance, and before any bargain and sale was executed by the commissioners of this estate: Held, that he took a fee simple conditional at common law, and that the commissioners might execute a valid conveyance of the estate after his death, pursuant to 1 Jac. 1. c. 15. s. 17.

EJECTMENT to recover a copyhold messuage, divided into tenements with their appurtenances, situate at *Long Melford*, in the county of *Suffolk*. The cause was tried at the last Spring assizes for that county, before *Graham B.*, when a verdict was found for the lessor of the plaintiff, subject to the opinion of this Court upon the following case. The grandfather of the lessor of the plaintiff being seised in fee, according to the custom of the manor of the rectory of *Melford*, of the estate for which this action was brought, and having duly surrendered the same to the use of his will, devised as follows: "First, I give and devise unto my wife, all my freehold and customary, or copyhold messuages or tenements, with the outhouses, &c. the copyhold being surrendered to the use of my will, situate in *Melford*, and now in the several occupations of myself and others: to hold the same to her for the term of her natural life, and from and after the decease of my wife, then I give and devise unto *Paul Spencer*, my son, all that messuage and tenement, with the outhouses, &c. now in my own occupation; to hold the same to him, and the heirs of his body lawfully to be begotten for ever. But in case my son shall die without issue, or shall not survive his mother; then I devise all the said last mentioned premises with the appurtenances unto my two daughters, *Alice* and *Sarah*, to hold the same to them and their heirs, as tenants in common, and not as joint tenants. The testator, shortly after making his will,

will, died, and his wife *Jane Spencer*, was, on the 20th *November*, 1783, admitted under the will to the copyhold premises so devised to her for life, &c. In 1802, she died, leaving *Paul Spencer* her son living, who died on the 19th *April*, 1803, without having been admitted to the premises devised to him under the will of his father. *Paul Spencer* left *William Spencer*, the lessor of the plaintiff, the only son of his body him surviving, (then a minor,) who was admitted to the premises in question, at a special court held the 6th day of *June*, 1803. On the 13th *December*, 1793, a commission of bankruptcy issued against *Paul Spcncer*, the father of the lessor of the plaintiff, upon which he was found and declared a bankrupt. On the 2d *December*, 1802, the assignees contracted for the sale of the premises in question, and on the 26th *September*, 1805, the commissioners under the commission against *Paul Spencer*, together with the assignees, conveyed the premises in question, by bargain and sale inrolled, to the defendant in fee for a valuable consideration. And on the 3d *July* following, the defendant was admitted in the Manor Court under the bargain and sale. The question for the opinion of the Court was, whether any, and what interest passed by the bargain and sale executed after the death of the bankrupt to the defendant.

Storks, for the lessor of the plaintiff. The effect of this will was to give to the bankrupt an estate tail, supposing that the land had been freehold; but as it was copyhold, and no custom is found to exist within the manor for entailing, it is only an estate upon condition; such an estate, however, is within the meaning and policy of 21 *Jac.* 1. c. 19. s. 12. Then if so, the question

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Dox dem.
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tchik.*

question is, whether the provision of 1 Jac. 1. c. 19. s. 17. can be applied to a subsequent act of parliament. That point has never been decided. In *Parker v. Bleke* (a), the bankrupt died after the bargain and sale, and before the admittance, and all that the Court decided was, that upon admittance the bargainer had the estate in him by relation, from the time of the bargain and sale. So in *Beck dem. Hawkins v. Welsh* (b), it is quite clear, although not so expressly stated, that the bargain and sale must have been executed previously to the death of the bankrupt. There is, therefore, no case in which it has yet been held, that the 21 Jac. 1. c. 19. s. 12. can be coupled with 1 Jac. 1. c. 15. s. 17.; and upon principle it ought not, for it would be a strong construction, and its consequences would go to deprive the issue in tail of their rights, after they had become vested by the death of the tenant in tail; and besides, copyholds are not mentioned at all in 1 Jac. 1. c. 15. s. 17. Here, too, the bankrupt died without being admitted. *Vernon v. Vernon*. (c)

Cooper, contrà. In *Crisp v. Pratt* (d) it was held, that copyholds were within the purview of all the statutes of bankruptcy, viz. 13 Eliz., 1 Jac. 1., and 21 Jac. 1.; and it was there added, that those statutes ought to be construed liberally, to make as strong provision as they may against the bankrupt. If so, it may safely be contended, that the provision of 1 Jac. 1. c. 15. s. 17. may be construed with 21 Jac. 1. c. 19. s. 12., and then there is no doubt in this case. But it is not necessary

(a) *Cro. Car. 568.*
(c) 7 *Eas.*, 8.

(b) 1 *W&L. 296.*
(d) *Cro. Car. 549.*

to contend this. For the estate of the bankrupt under the will being a fee simple conditional at common law, and the condition being fulfilled, his estate might have been conveyed away during his life without the assistance of 21 *Jac.* 1. c. 19. s. 12. under the 13 *Eliz.* c. 7. s. 11., and then there can be no doubt that 1 *Jac.* 1. c. 15. s. 17. applies to the case. As to the want of admittance of the bankrupt, it is unimportant. For the admittance of the tenant for life was, for this purpose, an admittance of him in remainder.

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Stranor
against
Clark.

ABBOTT C. J. I am of opinion, that the effect of the will stated in the case, was to give to the bankrupt a fee simple conditional, the condition being, that the estate was to become absolute on his having issue and surviving his mother. Both these events happened, and, therefore, the fee simple conditional vested in him, his mother having been also admitted, in pursuance of the will, to the copyhold property. He, therefore, under these circumstances, had a good title against all the world, and the commissioners of bankrupts might clearly have sold the estate during his lifetime, pursuant to the provisions of 13 *Eliz.* c. 7. s. 11. Here, however, his death intervened before the contract which had been made during his lifetime had been completed. The statute 1 *Jac.* 1. c. 15. s. 17. provides, that the death of the bankrupt shall not prevent the commissioners from dealing with his estate. For it enacts, that if the bankrupt die before the commissioners shall distribute his goods, lands, and debts, they may still proceed in execution, in and upon the said commission, for and concerning his goods, lands, tenements, hereditaments and debts, in such sort as they might have done if he were living. But it is

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CLerk.

said, that copyholds are not within this clause. Without any authority on the subject, I should have been of opinion, that the word land there found would apply to every species of land mentioned in the 13 *Eliz. c. 7.*, whether copyhold or freehold. It was, however, decided, in the case of *Crisp v. Pratt*, that copyholds were within the statute 1 *Jac. c. 15.* That is an authority expressly in point. Taking therefore, the whole case together, it seems to me perfectly clear, that the deed of bargain and sale executed by the commissioners operated to defeat the estate, which would otherwise have vested in the lessor of the plaintiff, under his grandfather's will.

BAYLEY J. It is not necessary to determine in this case, whether an estate tail could be divested, after the death of the bankrupt, by a bargain and sale executed by the commissioners; for this being a copyhold estate, and there being no custom stated to exist within the manor for entailing copyhold, the estate taken by the bankrupt was a fee simple conditional at common law. Then, this being an estate in fee simple conditional at common law, as soon as the bankrupt had issue, he had the same power over the property as if he had been seized of it in fee simple absolute. Now, under the statute of *Elizabeth*, the commissioners had full power to dispose of land so held by the bankrupt, and during his life they might have done so by a common conveyance. In such cases, after the death of the bankrupt, the same power was given to them by the statute 1 *Jac. 1. c. 15. s. 17.* The object of the statute 21 *Jac. 1. c. 19. s. 12.* was different. Previously to that act, the commissioners had no power to compel the bankrupt to bar his issue by a recovery; and therefore, it was not in their

power

power to make a valid conveyance of entailed property belonging to the bankrupt. The legislature thought this unjust, and therefore enacted, that the commissioners might dispose of such property by deed indented and enrolled. But before that statute, the commissioners had full power to dispose of an estate in fee simple conditional. It is said, that there was not any admittance of the bankrupt; but the admittance of the tenant for life was sufficient. The lord of the manor indeed might have compelled him to be admitted to secure his fine. But as far as strangers were concerned, he was a complete tenant before that time. Besides, if that objection were well founded, it would put an end to the plaintiff's title also. Upon the whole, I am of opinion, that the defendant is entitled to our judgment.

1822.

Dox dem.
Spencer
against
CLARK.

HOLROYD J. I am of opinion, that the estate passed by the bargain and sale, notwithstanding the previous death of the bankrupt. It is established by many cases, that the admittance of the tenant for life is a sufficient admittance of those in remainder, although not such as to bar the lord of the manor of his fine. That being so, the question is, as to the nature of the estate taken under the will. If that was a fee simple conditional, there is an end of the case. But as no custom is found for entailing copyholds in the manor, the estate taken by the bankrupt was a fee simple conditional, and therefore, might, during the life of the bankrupt, have been conveyed by the commissioners under the provisions of the 18 Eliz. c. 7. s. 11. The clause, therefore, in the 1 Jac. 1. c. 15. seems to me to apply to the present case. The 21 Jac. 1. c. 19. s. 12. does not apply to it. That act only empowered the commissioners to bar the issue, where

1822. the bankrupt could have done so by suffering a recovery.
Doe dem.
SCHUCKER
against
CLARK.
 It is not necessary in the present case to determine what would be the effect of a bargain and sale executed by the commissioners after the death of the bankrupt in a case where, during his life, he had been seized of an estate tail.

BEST J. concurred.

Judgment for the defendant.

*Tuesday,
January 29th.* **DOE on the demise of ELIZABETH LIVERSAGE
against VAUGHAN and WALKER.**

Where a testator bequeathed a burgage tenement to his nephew, *J. L.*, for life, and from and after his decease, to all and every the child and children of *J. L.* lawfully begotten, or to be begotten, whether sons or daughters, they, if more than one, to take, as tenants in common, in equal shares and proportions; and for want of such issue, to his own right heirs for ever: Held, that under this devise, *J. L.* took only an estate for life, and that after his death, his children took only estates for life as tenants in com-

EJECTMENT for a messuage and premises called the *Golden Lion Inn*, situate at *Newcastle-under-Line*, in the county of *Stafford*. At the trial before Park J. at the last *Lent assizes* for the county of *Stafford*, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case. *Thomas Liversage* being seised in fee of the premises in question, on the 6th *December*, 1788; made his will, by which he devised a burgage tenement in *Newcastle-under-Line*, to his brother *Joseph Liversage* for life, and then he devised as follows: "I give and devise all that messuage, tenement or dwelling-house, standing, and being in *Newcastle-under-Line* aforesaid, now in the holding of *John Harrison*, with the brewhouse, &c. unto my brother, *Joseph Liversage*, and his assigns, for and during the term of his natural life, desiring him to be kind to his and my sister, *Mary Salmon*; and from and after his decease, I devise the said messuage, burgage tenement, or dwelling-house, with their appurtenants,

tenants, so before given and devised by me, to my said brother *Joseph* for life, unto my nephew *John Liversage* and his assigns, for and during the term of his natural life, and from and after his decease, unto all, and every the child and children of the said *John Liversage*, lawfully begotten, or to be begotten, whether sons or daughters, they, if more than one, to take as tenants in common, in equal shares and proportions, and for want of such issue, to my own right heirs for ever. And I devise unto my said nephew, *John Liversage*, his heirs and assigns for ever, all that dwelling-house with the appurtenances, now in the tenure of *Thomas Stretch*. Also, I devise unto my nephew, *Robert Liversage*, and his assigns, for and during the term of his natural life, all that my messuage, burgage tenement or dwelling-house, in *Newcastle-under-Line*, now in my holding, with the brewhouse, &c. And from and immediately after his decease, I devise the same messuage, burgage tenement or dwelling-house, with the rights and appurtenances to the same belonging, unto all and every the child or children of the said *Robert Liversage*, lawfully begotten, whether sons or daughters, they, if more than one, to take as tenants in common, in equal shares and proportions, and for want of such issue, to my own right heirs for ever. And I devise all that one day-work, or reputed day-work of copyhold land, lying and being near *Newcastle* aforesaid, in a certain common or town field, called the *Stubbs*, unto my said nephew, *Robert Liversage*, his heirs and assigns for ever." There were several other devises of personal and real property in the will. The testator died 27th June, 1797, seised of the premises in question, without altering or revoking his will. *Joseph Liversage* died in the life-time of the testator, on the

1822.

Dox dem.
LIVERSAGE
against
VAUGRAN.

1822.

Dno dñm.
Liversage
againt
Vaughan.

29th June, 1791. At the time of the testator's decease, *Robert Liversage* was his heir at law, being the eldest son of *Joseph*, the testator's brother. On the 1st *March*, 1798, *Robert Liversage* made his will, duly executed and attested, and devised all his real estate in possession, reversion or remainder, to *Elizabeth Liversage*, the lessor of the plaintiff, for life, with remainders over. *Robert Liversage* died 6th *February*, 1799, without altering or revoking his will. *John Liversage* entered into possession of the premises devised to him by the will of *Thomas Liversage*, and died in 1800, leaving two daughters, *Ann* and *Elizabeth*, him surviving. *Ann*, the eldest daughter, married the defendant, *Joseph Vaughan*, and is still living. *Elizabeth*, the youngest daughter, married, but died a minor on the 26th *July*, 1810, leaving her husband and one child her surviving; this child died in about a fortnight after. Upon her death, the defendant, *Vaughan*, and his wife, took possession of the whole of the premises devised to *John Liversage*, and afterwards by deed of feoffment, bearing date 13th *December*, 1814, and fine with proclamations of *Hilary term*, 1815, conveyed the premises to one *Richard Richardson* in fee, to such uses as *Joseph Vaughan* should by deed or will appoint: and in default thereof to *Joseph Vaughan* for life, afterwards to the use of *Alexander Oliver* and his heirs, during the life of *Vaughan*, in trust for *Vaughan* and his assigns: remainder to the use of *Vaughan*, and his heirs and assigns for ever. And afterwards, by deeds of lease and release, dated 13th and 14th *February*, 1815, the release made between *Joseph Vaughan* and his wife of the one part, and *John Walker* of the other part, *Joseph Vaughan*, under the power contained in the deed of feoffment, as a security by way of mortgage, conveyed

conveyed the premises to *John Walker* in fee, subject to redemption on payment, &c., and a recovery was suffered of the premises in *Michaelmas* term, 1815, to the use of *John Walker*, for the better securing the money advanced. The defendant, *Walker*, was in the receipt of the rents and profits of the premises under the above conveyance. In *Hilary* term, 1815, *Vaughan* and his wife levied a fine, sur conuzance de droit come ceo, of the premises, the last proclamation on which took place in *Michaelmas* term, 1815. The declaration in ejectment was delivered on the 19th *January*, 1821, and before the day of the demise laid in the declaration, and within the time limited by law, the lessor of the plaintiff duly made an entry on the premises to avoid the fine.

1822.

*Doz dem.
LIVERSAGE
against
VAUGHAN.*

Campbell, for the lessors of the plaintiff. Under this devise, *John Liversage* took only an estate for life, and after his death, his children took as tenants in common for life. There is here no general intent to be found, by which the particular intent in this clause of the will is to be overruled. The devise in this case is to *John Liversage* for life, and from and after his decease, to all and every the child and children of *John Liversage*, lawfully begotten or to be begotten, whether sons or daughters. Now it is clear, that by this only the immediate issue of *J. Liversage* were meant, and not generally the race to descend from him. In *Wild's* case (*a*), land was devised in remainder to *R. W.* and his wife, and after their decease to their children; and it was held, that the children took only an estate for life in remainder. And *Goodwyn v. Goodwyn* (*b*) is to the

(a) 6 Co. 16. b.

(b) 1 Ves. sen. 226.

H h 4

same

1822.

Doe dam.
Liversage
against
Vaduan.

same effect. The words "child or children" are therefore here words of purchase and not of limitation, and they are further qualified by the words which follow, "they, if more than one, to take as tenants in common, in equal shares and proportions;" which words were much relied on in *Doe v. Jesson*. (a) And though that case has since been overruled in the House of Lords, it was on another ground, viz. that there the first devise being in terms of an estate tail, could not be cut down by these subsequent words to an estate for life. But here, the prior words are such as of themselves would only give an estate for life, and the construction is therefore fortified by the subsequent clause. Then come the words on which the other side rely, "and for want of such issue." But, "such issue" must be words of reference to what has preceded, viz. child or children. The clause is therefore tantamount to, "and for want of such child or children," which are manifestly not sufficient to create an estate tail by implication. *Hay v. Lord Coventry* (b) and *Foster v. Earl of Romney* (c), are authorities on this point. Then, if only an estate for life was devised by the will, it is quite clear that there has been a forfeiture of the estate by the fine which has been levied, *Com. Dig. tit. Forfeiture A.*

Puller, contra. It may be admitted, that if an estate for life only passed by the will to the children of *John Liversage*, there was a forfeiture; but here, the question turns on the intention of the testator, to be collected from the whole will. This was a devise of a burgage tenement, and it can hardly be supposed that the testator,

(a) 5 M. & S. 95.

(b) 5 T. 1, 83.

(c) 11 East, 594.

who

who in the same will had devised another burgage tenement, in the same way, to *Robert Liversage*, the heir at law, could have intended, if *John Liversage* should die, leaving a large family, then, that on the death of each child, a proportionate part of this tenement should go over to the heir at law, who was already provided for. Here the devise was to persons not in esse at the time of the will; and, under such circumstances, the word children has, in many cases, been held to be co-extensive with issue, and to include remote descendants. *Cook v. Cook* (*a*) and *Wild's* case are authorities for this. In *King v. Melling* (*b*) several cases are cited, to shew, that the words "children" and "issue" have been sometimes construed to create an estate tail. In *Moore*, 397, devise by *A.* to his son for life, and after his decease to the men-children of his body, was held to be an estate tail; and the certificate of *Ashurst* and *Buller J.*, in *Griffith v. Harrison* (*c*), and the cases of *Seale v. Batter* (*d*), *Doe v. Webber* (*e*) are authorities to shew, that the word "children," in a will, may include grandchildren, and even more remote descendants. Here, too, there are the words "for want of such issue." In *Doe v. Reason*, cited in *Doe v. Holmes* (*f*), *Ryder C. J.* laid it down, that in a will, the word "issue" operates as effectually to make an estate tail, as the words "heirs of the body" do in a deed; and the observations of *Lawrence J.*, in *Watson v. Faxon* (*g*) and *Pierson v. Vickers* (*h*), are to the same effect. No case can be found, where, when the

1822.
Devised
Liversage
against
Vassall.

(*a*) 2 *Vernon*, 545.

(*b*) 1 *Vestr.* 225.

(*c*) 4 *T. R.* 737.

(*d*) 2 *Bos. & Pul.* 485.

(*e*) 1 *B. & A.* 713.

(*f*) 3 *Wilson*, 245.

(*g*) 2 *Eas.*, 51,

(*h*) 5 *Eas.*, 548.

1822.

Doe dem.
Liversage
against
Vassian.

word children, in a devise, under such circumstances, is followed by the word issue, it has not been held sufficient to pass an estate tail. As to the words "sons and daughters," they can make no difference; they only mean, that an estate in tail general, and not in tail special, should pass to the devisees. Taking, therefore, the whole of this devise together, the subsequent words "for want of such issue," shew, either that the words "child or children" are to be taken as words of limitation, and then *John Liversage* would take an estate tail, or that they give to him an estate for life, and a remainder in tail to his children. It is true, that, according to this construction, the words "to take as tenants in common, in equal shares and proportions," must be rejected. But in *Pierson v. Vickers*, the words "as tenants in common" were rejected, as being inconsistent with the general intent of the will; and so in *Doe v. Applin (a)*, the words, "and amongst" were rejected for the same reason; and *Doe v. Smith (b)* and *Doe v. Cooper (c)*, and *Doe v. Jesson*, in the House of Lords, are to the same effect. Here, therefore, in order to carry the general intent into effect, the will must be read thus: "To *John Liversage* for life; and from and after his decease, to all and every the child and children of *John Liversage*, whether sons or daughters, and for want of such issue, then over." If so, it falls very nearly within the words of *Hodges v. Middleton (d)*, which is hardly distinguishable from this case. There there was a devise to *B.* for life, and at her death, to her children; and in case of failure of children, then over; and the Court held, that either *B.* had an estate

(a) 4 T. R. 82.

(c) 1 East, 229.

(b) 7 T. R. 534.

(d) Doug. 431.

tail

tail or an estate for life, with remainder in tail to her children. Either, therefore, in this case, *John Liversage* took an estate tail or an estate for life, remainder in tail to his children. In either event, there has been no forfeiture, and the defendant is entitled to the judgment of the Court.

1822.

Dec'dem.
LIVERSAGE
against
VAUGHAN.

ABBOTT C. J. I am of opinion, that a life estate only passed under the will to the daughters of the testator's nephew, *John Liversage*. It is very probable that the testator, like many other persons unacquainted with the law, may have thought that a real estate in fee simple would pass by the same words as would be sufficient to pass the absolute interest in a case of personal property ; but in this he laboured under a mistake. In this will there are no words to be found, either connected with the persons intended to take, or with the thing devised, so as to shew the quantum of interest intended to be given. In the case of *Hodges v. Middleton*, the testator, by his will, bequeathed " all his real estate in the parish of *Barking*," which shewed the quantum of interest intended to pass under the will ; but in this will there are no such words; nor are there any words applied to the persons, the objects of his bounty, to shew that they were to take an estate of inheritance, as would be the case if the words " heirs of the body" or " issue" had been used. The expressions in the will are " all and every the child and children of the said *John Liversage*, lawfully begotten or to be begotten, whether sons or daughters, they, if more than one, to take as tenants in common, in equal shares and proportions." I cannot say, that under these words, the testator meant to include grandchildren, or more remote descendants. Then
there

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Dor dem.
LIVERSAGE
against
VAUGHAN.

there follow the words, "and for want of such issue, to my own right heirs;" but these words will not enlarge the estate previously given; for it appears, from the authority of *Hay v. Lord Coventry*, and the other cases cited, that the words "such issue," must refer to the previous words, "child or children." If, indeed, the word "such" had been omitted, it might have been contended, that, by implication, an estate tail passed under the will. I am, therefore, of opinion, that in this case, the plaintiff is entitled to judgment.

HOLROYD J. (a) I am of opinion that by this will, *J. Liversage* took an estate for life, and that his children took only estates for life, as tenants in common. This is very distinguishable from those cases, where the words of the original limitation were sufficient of themselves to carry an estate tail, and where the only question was, whether they could be controlled by the subsequent words of the will. There it has been held, that the general intention could not be carried into effect, without giving to those words their ordinary signification; and for that reason, the Court have rejected the other words, which were inconsistent with it. But here, there are no such words to be found, unless the words "child and children" are to be considered as *nomen collectivum*. It may be admitted, that a devise to a man and his children may, in some cases, give an estate tail, if it can be collected that such was the intention of the testator. But it is clear, in this will, that the testator did not use the words "child or children" in that sense, for he speaks of them as sons and daughters, which shews that he only contemplated the immediate descendants of *J. Liversage*;

(a) *Bailey J.* had left the court.

and

and he gives them an estate as tenants in common. Nor do the words "for want of such issue," carry the matter further; for they only refer to the words "child or children." I think, therefore, that neither expressly nor by implication, did an estate tail pass by this will.

1822.

Dor dem.
LIVERSAGE
against
VAUGHAN.

BEST J. I am clearly of opinion, that under this will, *J. Liversage* and his children took only estates for life. It is true, that in some cases, the word children may be taken as equivalent to the word issue; and it was so received in *Seale v. Barter*. But in that case, it seems to me that Lord *Alvanley* gives the key to the determination of the present case. There, the testator had bequeathed all his lands and estates to his son *John* and his children, lawfully to be begotten; and Lord *Alvanley*, in giving judgment, says, "Now, we are of opinion, upon all the authorities, that the words children lawfully to be begotten, in this case are not to be considered as words of purchase, but that the intention of the testator was to give his estate to his son, and the issue of his body generally." In this case, however, it is clear that the words "child or children" are not to be taken as words of limitation, but as words of purchase; for, by the will, they are to take, as tenants in common, in equal shares and proportions. The word children, as it seems to me, therefore, was intended by the testator to be confined to the immediate descendants of *John Liversage*. If so, the case of *Hay v. Lord Coventry* is in point, and shews that the words "such issue" must be confined to the previous words, "child or children," and cannot carry the case further. I am therefore of opinion, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

1822.

*Tuesday,
January 29th.***Cox and Others against TROY.**

When a defendant, having once written his acceptance with the intention of accepting a bill, afterwards changes his mind, and before it is communicated to the holder, or the bill delivered back to him, obliterates his acceptance : Held, that he is not bound as acceptor.

ASSUMPSIT upon a bill of exchange for 938*l.*, dated 20th *May*, 1820, drawn by *Stephen and James Roch*, upon the defendant and *W. T. Robarts*, since deceased, by the names and firm of Messrs. *W. T. Robarts and Co. London*, payable 61 days after sight to *Michael Murphy*, and indorsed by him to the plaintiffs, and alleged to have been accepted by the defendant and *W. Tierney Roberts*, payable at Messrs. *Robarts, Curtis and Co.* The first count stated these facts, and a presentment for payment when due, and refusal to pay at Messrs. *Robarts, Curtis, and Co.* The second count was on a general acceptance; and the third was special, stating that the bill was delivered to the defendant and *W. T. Robarts*, to determine, within a reasonable time, whether or not they would accept the same; and that they promised to take due care of the same, and return the same without defacing or spoiling it, which they did not do, but returned the same bill in a defaced and injured state. The declaration also contained the usual money counts. Plea, general issue. The cause was tried at the sittings after *Trinity term 1821*, before *Abbott C. J.* when a verdict was found for the plaintiff subject to the following case. It was admitted on the trial, that the bill of exchange mentioned in the declaration was drawn by Messrs. *T. and J. Roch* on the defendant and *W. T. Robarts*, since deceased, as stated the declaration, and that the same was duly indorsed by the plaintiff by the payee. The plaintiff in *Law*

rece

received the bill from *Cork* on the 24th *May*, 1820; and on the same day their clerk, by their directions, left it for acceptance at the defendant's counting-house in *Old Broad-street, London*, in the usual way. He did not call for it until *Saturday* the 27th *May*, upon which day one of the defendant's clerks delivered back the bill of exchange to him without any observations being made at the time. The words "24 *May*, 1820, at Messrs. *Robarts, Curtis and Co.*, *W. T. Robarts and Co.*" were written upon the bill by the defendant, or some one authorised by him, whilst the same was in his custody; and the jury found by their verdict that the defendant and the said *W. T. Robarts* did accept the bill of exchange; but at the time the clerk re-delivered the bill of exchange to the clerk of the plaintiffs, the words "24th *May*, 1820, at Messrs. *Robarts, Curtis and Co.*, *W. T. Robarts and Co.*" were inked and written over, so as with great difficulty to be decyphered. The defendant did not offer any evidence to account for the obliteration of the acceptance. The bill itself was not obliterated, or any part of it rendered illegible.

1822.

Cox
against
Trot.

Chitty for the plaintiff. In this case the acceptance, when once made, could not be revoked by the defendant. It is so laid down in *Marius*, p. 83. although that is only a loose dictum. But in *Mollov*, book 2. c. 10. s. 28. it is said, that when a party has once subscribed, he cannot afterwards blot out his name. And the *Hamburg* ordinance lays it down in general terms, that an acceptance once made cannot be revoked. *Trimmer v. Oddy*, cited in *Bentinck v. Dorrien* (a), is an authority in point.

(a) 6 *East*, 200. *Chitty on Bills*, 160. *S. C.*

There

1822.

Cox
against
Thor.

There Lord *Kenyon* was of opinion, that if a drawee deface the bill, that makes him liable as acceptor; and in *Thornton v. Dick* (*a*) this point was expressly ruled by Lord *Ellenborough*. It seems also to have been considered as the law in *Bentinck v. Dorrien*, and in *Fernandez v. Glynn*. (*b*) And it is treated as the law of France at the present day by *Pardessus*, a modern writer. (*c*) In *Adams v. Lindsell* (*d*), the defendant was held to be bound by the plaintiff's acceptance of the contract, although not communicated to him. Here the jury have found that there was once an acceptance by the defendants, and that being so, they had no right afterwards to revoke it.

Denman contrâ was stopped by the Court.

ABBOTT C. J. I am of opinion, that, in this case, the defendant is entitled to judgment. It is true, that the jury have found that he did accept the bill; but con-

(*a*) 4 *Esp.* 270.

(*b*) 1 *Campb.* 426. n.

(*c*) The passage referred to is in the *Cours de Droit Commercial*, by *J. M. Pardessus*, Paris, 1814, part 2. tit. 4. chap. 4. sect. 4. s. 1. p. 400. This writer, speaking of the effect of an acceptance, says, "Elle est irrévocable, et celui qui l'a donnée ne serait pas libre de la rayer, même du consentement de celui sur la présentation duquel la lettre auroit été acceptée, parce que l'acceptation n'oblige pas simplement l'accepteur envers le porteur; qu'elle forme également un contrat entre le tireur et l'accepteur." In the next paragraph the same learned writer says, "Cependant comme la bonne foi doit être avant tout considérée, et que la seule crainte de la fraude ne doit pas empêcher des opérations légitimes, le tiré qui auroit trop précipitamment accepté, et voudroit révoquer son acceptation avant que la lettre qui en est revêtue circule, pourroit la rayer et assurer la date et l'existence de ce changement par un protêt, ou par tout autre acte semblable, qui ne permettroit pas de croire que jamais la lettre ait circulé revêtue de l'acceptation non rayée."

(*d*) 1 *B. & A.* 681.

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1822.

~~Cox
against
Taoy.~~

necting that finding with the other facts of the case, it does not seem to me that it means more than that, at one period, the defendant, or some one in his behalf, did write an acceptance on it, and at that time was minded to accept it. The question will then be, whether, having that intention at the time, and having written his acceptance, he was at liberty, on an alteration of circumstances, to erase those words, before he delivered out the bill to the holder. Upon that question, there appears, in the books, to be some difference of opinion. In *Bentick v. Dorrien*, Lawrence J. says, "When the general question shall arise, it will be worth considering how that which is not communicated to the holder, can be considered as an acceptance, while it is yet in the hands of the drawee, and where he obliterates it before any communication made to the holder." That expression was used after the decision, in the cases of *Thornton v. Dick* and *Trimmer v. Oddy*. And at a later period, in *Raper v. Birkbeck (a)*, Lord *Ellenborough* says, "I remember *Pothier*, in his treatise on bills of exchange, speaking of an acceptor who has put his signature to a bill, but has not parted with it, says, that before he does part with it, 'il peut changer de volonté, et rayer son acceptation'; à fortiori, then, a third person who cancels an acceptance by mistake, shall not be held thereby to make void the bill, but shall be at liberty to correct that mistake, in furtherance of the rights of the parties to the bill." The manner in which Lord *Ellenborough* quotes the treatise of *Pothier*, seems to indicate, that, at that time, he did not retain the opinion which he had delivered in the case of *Thornton v. Dick*. In a

(a) 15 East, 20.

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case

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case like the present, which depends on the law merchant, the opinions of learned lawyers and the practice of foreign and commercial nations, though they cannot, strictly speaking, be quoted as authorities here, yet are entitled to very great weight and attention. When I find, therefore, that it is laid down in *Pothier's* treatise, that a party who has given an acceptance may erase it before the bill goes out of his hands, it affords a strong argument in support of the view which I take of the question. I think the rule there laid down is far better than the one contended for by the plaintiff. I cannot perceive how the holder of a bill, or any antecedent party, is prejudiced by it; for it is to him the same thing, whether when the drawees give it back, they deliver it to him unaccepted, or whether he finds that the drawees have withdrawn their acceptance, having at one time intended to accept it, but having subsequently changed their mind. Thinking, as I do, that no prejudice can arise to the holder, or any other parties to the bill, and that they are placed in precisely the same situation as if no acceptance was given, it seems to me, that it was competent for the acceptors to erase their acceptance before they delivered out the bill, and therefore that the defendant is entitled to our judgment.

BAYLEY J. I am of the same opinion. By the bill the drawer requires the drawee to come under an engagement to pay it when due. The question is, when the drawee comes under an engagement, whether by the act of writing something on the bill, or by the act of communicating what has been written to the holder, and I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill,

bill, but the making a communication of what is so written, that binds the acceptor; for the making the communication is a pledge by him to the party, and enables the holder to act upon it. But while it remains in the drawee's hands, it seems to me, the acceptance is not fully binding on the person who signed it, and he is at liberty to say, before he parts with it, "I have not yet entered into an engagement to accept."

1822.

Cox
against
Trot.

HOLROYD J. I also think, that in this case the party was at liberty to cancel his acceptance prior to the time when the bill was delivered back. In the old books there are dicta which import that an acceptance once made cannot be revoked. In some of them it is said, any thing which amounts to an assent to pay the bill, whether in writing or otherwise, is in point of law an acceptance; and I suppose it has been on that principle, that the case of *Thornton v. Dick* was determined; but the two subsequent cases seem to shew that Lord *Ellenborough* had doubts as to his former opinion. In *Fernandez v. Glynn* the cancelling of the cheque was with the view and under the idea that it would actually be paid, and in that case it was probably contended, either that the crossing or cancelling the bill amounted to actual payment, so that an action for money had and received would lie for the amount against the bankers, or that if not, yet it was to be considered in the nature of an acceptance. Now that case seems to me to apply strongly to the present; for there, according to the usage, if a cheque was intended to be paid, it was cancelled, but if not, nothing was done, but it was returned to the parties from whom it was received. And when the cheque in that case was cancelled, it was done with the intention of payment, and not really by mistake.

1822.

Cox
against
Thor.

In consequence, however, of the large payments made in the course of the day, on account of the drawer, the bankers changed their intention; yet there the cheque was delivered back, and the original drawer only was considered bound to pay it. The opinion of *Pothier*, stated in *Raper v. Birkbeck*, is precise on this subject, and is far better authority than the passages cited from *Marius*. Where a man accepts a bill, and delivers it out accepted, he must remain irrevocably bound by it. In contracts made between parties at a distance, if a man writes his acceptance, and sends it out of his hands, he cannot revoke it afterwards. I am satisfied, however, that this is not a binding acceptance on the party, having been cancelled anterior to the time when the bill was delivered back.

BEST J. This is a question on the law merchant, and it is desirable, that that law should be the same in this as in every other commercial country. We ought, sitting here, to act according to the judgments of the courts in our own country, but in the absence of these authorities, we may with great advantage take into our consideration the opinions of learned writers on this point. There seems to be no authority in the English law, except the case of *Thornton v. Dick*. I agree with my Lord C. J., that Lord *Ellenborough* seems to have changed the opinion which he is reported to have delivered in that case. The passage in *Molloy* is probably applicable to the case where the bill has been delivered out, for it does not speak of cancellation, but revocation. But the authority of *Pothier* is expressly in point. That is as high as can be had, next to the decision of a court of justice in this country. It is extremely

tremely well known that he is a writer of acknowledged character ; his writings have been constantly referred to by the Courts, and he is spoken of with great praise by Sir William Jones in his *Law of Bailments*, and his writings are considered by that author equal in point of luminous method, apposite examples, and a clear manly style, to the works of *Littleton* on the laws of this country. We cannot, therefore, have a better guide than *Pothier* on this subject. As to the opinion of *Pardessus*, I should understand him as rather speaking of bills delivered out, accepted, and not erased. That seems to me perfectly clear from the next passage, where he says, that though a man does accept a bill, still if he cancels that acceptance before he delivers it out, that is sufficient. But considering this as a question merely of common sense, and judging by analogy, is it not clear that the party is not bound in such a case as this ? It may be said, that the defendants here ought to have shown that this was done by mistake. How is it possible to do that ? The thing looks like a mistake. He may have written an acceptance, and afterwards find when he has written it, that it is on the wrong paper ; and not meaning to accept that bill, he does that which shews, that it was his intention not to enter into such a contract. Nobody can be injured by it. When the bill goes back it is in as good a state as it came. The party is still placed in the same situation. It appears to me, therefore, not only on authority, but on the principles of common sense, that the defendant was not bound by this as an acceptance, and that our judgment ought to be in his favour

Judgment for the defendant,

1822.

Cox
against
Troy.

1822.*Thursday,
January 31st.**Ex parte HUGHES.*

Where an attorney, in order to get possession of papers belonging to *A. B.*, in the hands of *A. B.*'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that *A. B.* should enter into an unqualified reference, not revocable, &c.: Held, that *A. B.* having become subsequently bankrupt for the second time, and without paying 15*s.* in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 G. 3. c. 121. s. 14. so as to dispense with the reference, and that the attorney was liable, pursuant to his undertaking, to procure *A. B.*'s signature to an agreement of reference, and to find security for the performance of the award to the satisfaction of the master.

SCARLETT, in *Easter term*, 1820, obtained a rule nisi, calling on *John Garnett*, an attorney of this Court, to shew cause why he should not name an arbitrator, and procure *Hugh Emett*, his client, to execute an agreement of reference, and find security to the satisfaction of the master for *Emett's* performing the award. It appeared that *Emett* had been in trade in partnership at *Liverpool*, and being indebted to *Hughes*, who had formerly been his attorney, for professional business done by him, and there being a dispute as to the amount, a reference between them was proposed. At that time, *Hughes* having papers belonging to *Emett* in his hands, of which *Garnett*, who was then *Emett's* attorney, wanted to get possession, the latter undertook in writing, that *Emett* should enter into an unqualified reference, as to the matter in dispute between him and *Hughes*, which reference was not to be revocable by *Emett*, provided *Hughes* would give up the papers. This was accordingly done. On shewing cause, the affidavits were ultimately referred to the master, who reported as follows: "I find that Mr. *Garnett* is liable under the guarantee given to Mr. *Hughes*, and I direct that Mr. *Garnett* shall, before the first day of *February* next, procure Mr. *Emett* to execute the agreement of reference as heretofore prepared, or execute the same as the attorney of Mr. *Emett*, and shall also, before the said first day of *February* next, find security to my satisfaction for performance by the said *Emett*, of the award

to

to be made in pursuance thereof, unless the Court shall be of opinion, that Mr. *Garnett* is discharged from his liability under the following circumstances. Mr. *Hughes*, without the consent of Mr. *Garnett*, proved a debt of 100*l.* under a second commission awarded against *Emett*, and dated 11th *September*, 1820, and had a claim reserved for a further sum against *Emett's* separate estate under that commission, Mr. *Hughes*, in his proof, excepting the undertaking of Mr. *Garnett*. Mr. *Hughes* also tendered a proof of a debt of 249*l.* 15*s.* 3*d.* against *Emett* as partner with one *Monkhouse*, also excepting the said guarantee of Mr. *Garnett*, but such proof was objected to by Mr. *Garnett*, as solicitor to the commission, as being a joint proof. The undertaking of *Garnett* was given after the date of the first, and before the date of the second commission, and *Emett*, under that commission, has not yet paid 15*s.* in the pound. No part of the debt has been paid or offered to be paid by Mr. *Garnett*."

1822.

~~Ex parte
Hughes~~

Littledale contended, that the proof under *Emett's* commission dispensed with the necessity of any reference, having amounted to an election under the 49 G. 3. c. 121. s. 14., and that, therefore, *Garnett* was not liable under this guarantee. Here too, this was a second bankruptcy, under which 15*s.* in the pound was not paid, and therefore, if *Hughes* had not proved under the commission, *Garnett* might have brought an action against *Emett* for the money paid by him as surety, under which action he might have made his future effects liable; and he cited *Mead v. Braham.* (a)

(a) 3 M. & S. 91.

1822.

Ex parte
Hughes.

Per Curiam. It was the duty of *Garnett* to have paid the debt before the proof of *Hughes* under the bankruptcy, or at all events, to have given *Hughes* notice not to prove, if he thought that would be a disadvantage to himself. If, therefore, any inconvenience arises to him in respect of the proof made by *Hughes*, his own neglect was the cause of it. Here, *Hughes* had *Emett* for his debtor and *Garnett* as the surety, and he therefore had a full right to prove under *Emett's* commission. Besides, the legislature consider the proof against the principal as a benefit to the surety, by relieving him pro tanto from the debt. The rule must therefore be made absolute.

Rule absolute.

Scarlett and *Parke* were to have supported the rule,

Thursday,
January 31st.

The KING against the Justices of NORFOLK.

Where an order of removal has been executed, and by consent of the removing parish and the magistrates making it, it is superseded, and the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that

justice requires it, in order to compel the respondents to pay the costs of maintenance, &c. incurred by the appellants before the order was superseded.

COOPER, in last Michaelmas term, obtained a rule nisi for a mandamus to the defendants, commanding them to enter continuances, and hear the appeal of the churchwardens and overseers of the parish of *Little Hautboys with Lammas*, in *Norfolk*, against an order of two magistrates for removing *Hannah*, the wife of *Edward George*, (then a prisoner in the house of correction at *Aylsham* in that county, convicted of larceny,) and her family from the parish of *Repps with Bastwick* to *Little Hautboys with Lammas*. It appeared, that the

removal

removal had taken place on 22d *August* last, and that on the 5th *September* following, notice of appeal was given. On the 10th *October*, a supersedeas, under the hands and seals of the removing magistrates, was served on the officers of the appellant parish, stating, that doubts had been entertained whether the order could be supported by legal evidence, and requiring them to deliver up the duplicate order to be cancelled, and also requiring the other party to take back the pauper. It appeared, that this was done at the instance of the respondents, the order of removal having been founded on the examination of *Edward George*, taken under 59 G. 3. c. 12. s. 28., and that, he being a prisoner convicted and under sentence for larceny, his examination was not evidence, he himself not being an admissible witness until the expiration of his sentence. It did not appear on the affidavits, whether the costs of maintenance between 22d *August* and 10th *October*, had been paid or tendered by the respondents. On the 17th *October*, application was made to the sessions for leave to enter the appeal, which was refused, the Court being of opinion, that the order was completely at an end.

1822.

The KING
against
The Justices of
Norfolk.

E. Alderson shewed cause. It is obvious that this removal took place under a mistaken construction of the 59 G. 3. c. 12. s. 28., which must of course be confined to the examinations of such persons in custody, as are in other respects admissible witnesses. As soon as this mistake was discovered, the order was superseded, and *Rex v. Diddlebury* (a) is an authority to shew, that, even after the execution of an order of removal, the justices

(a) 12 East, 359.

may,

1822.

The King
against
The Justices of
Norfolk.

may, with the consent of the respondents, supersede it: and the consent of the appellants is not necessary. The only object of this motion is, to prevent a trial on the merits; for if the writ of mandamus is now to issue, the respondents will be compelled to try the case without the evidence of *George*, who, as soon as his term of imprisonment is over, will be a competent witness.

Cooper, contrà, relied upon *Paneras v. Rumbold* (5), as shewing the distinction, that, though the justices may supersede an order before, they cannot do so after it is executed; besides, here the appellants have been compelled to provide for the paupers from the 22d *August* up to the 10th *October*, and if this be allowed, it will entail great hardship upon parishes, for justices may remove paupers immediately after one sessions, and supersede their order immediately before the next. As to the objection that the merits cannot be tried whilst *George* remains in prison, that is not important, because it is in the power of the sessions to respite the appeal from time to time, until he becomes a competent witness.

BAYLEY J. This is a very different case from *Paneras v. Rumbold*, which is only an authority to shew that the justices having been surprised into making an order, may, of their own authority, and without the consent of the removing parish, supersede it before execution, but not after. But in this case, there is the consent of the removing parish. The language of Lord *Ellenborough*, in *Rex v. Diddlebury*, puts it upon that very ground,

for he says, "there are two ways of getting rid of an order, one by consent of the parish in whose favour it is made to abandon it, the other by appeal;" and he adds afterwards, "what objection can there be, as Lord Mansfield observed, in the case of *Rex v. Llanrhydd*, to a party's abandoning a judgment intended for his own benefit." These observations shew that the consent of the removing parish alone is requisite. I think, that in cases like this, the sessions may exercise a discretion, and enter the appeal or not, so as best to answer the purposes of justice. If the parties removing do not chuse to pay the expenses of maintenance incurred, previously to the supersedeas, they may then enter the appeal, for the purpose of compelling them so to do. If they are willing to do it, the sessions may refuse to enter the appeal: Here the only object of entering it, would be, either to obtain a decision from the sessions, in the absence of a material witness, or to respite the appeal from time to time. In the latter case there would be a useless expense entailed upon the parties. As soon as George is discharged from prison, a new order may be made; and it is better for the appellants that it should be so, for they will not be compelled to keep the family in the mean time. I think, therefore, that it was entirely in the discretion of the sessions to enter the appeal or not, and I do not see any ground why this Court should interfere with their decision. This rule must therefore be discharged.

BEST J. The principle upon which this Court proceeds in issuing the writ of mandamus is to prevent a failure of justice. Here the very reverse would be the effect. For we should either compel the sessions to hear

the

1822.

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against
The Justices of
Norfolk.

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Norfolk.

the case in the absence of the person who can give the most material information, or put the parties to the useless expence of obtaining respites from time to time, till his imprisonment be over.

Rule discharged. (a)

(a) *Abbott C. J. and Holroyd J. had left the court.*

*Friday,
February 1st.*

The KING against LANE.

Where, in an application for a quo warranto against a constable, the affidavits in support of the rule stated, that for 50 years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial : Held that it was not sufficient.

J. WILLIAMS, in last *Michaelmas* term, obtained a rule nisi for a quo warranto against the defendant, as constable of the township of *Falsworth*, in the county of *Lancaster*. The affidavits stated, that for 50 years and upwards, and as far back as the deponents could recollect, it had been the usual and established custom for the constable to be elected by the payers of rates at a meeting for that purpose ; and that, at a meeting so held on the 3d *October* last, *Joseph Lancashire* was appointed ; but that, notwithstanding, the deputy-steward of the court-leet of the wapentake of *Salford* had sworn in the defendant as constable for the year. But none of the deponents expressly stated, that to their belief there had been immemorially such a custom in the town.

Cross Serjt. and Tindal were about to have shewed cause, when the Court called upon *J. Williams* to answer the preliminary objection, that no immemorial custom was stated in the affidavits. He contended that it was sufficient

sufficient if facts were there stated from which a jury would necessarily draw that conclusion: and that such facts were stated in this case.

1822.

The King
against
Lane.

Per Curiam. It is necessary on the face of the affidavits to state, that there is, as the witnesses believe, an immemorial custom to elect in this way; and it is not enough to state facts from whence the conclusion may be drawn, for it may be consistent with these affidavits that the parties making them may know when the custom originated. In the case of *Rex v. Standard Hill* (*a*), which was an application to have overseers appointed for a vill, it was held to be necessary to swear positively that it was a vill by reputation. (*b*)

Rule discharged.

(*a*) 4 M. & S. 378.

(*b*) See *Rex v. Williamson*, 3 B. & A. 582.

TAYLOR and Another, Assignees of WELSH, a *Friday,*
Bankrupt, *against* HIPKINS and GREGORY. *February 1st.*

ON the 4th of June, 1812, while the defendant *Gregory* was abroad, a writ of special capias, at the suit of the plaintiffs, issued against the two defendants, as co-partners, returnable on the morrow of *All Souls*, indorsed for bail for 1000*l.* On the 11th of December, 1812, an alias special capias issued, returnable in fifteen days of *St. Martin* in *Michaelmas* term, 1812, and a pluries, returnable in eight days of *St. Hilary*, 1813. *Hipkins* died in *September*, 1813. On the 17th *March*, 1821, the plaintiffs struck a docket against *Gregory*, and

In order to save the statute of limitations, it is sufficient that the writ be sued out, and the return thereon indorsed upon it in time. It is not necessary that the writ should be delivered out of the sheriff's office as returned.

he

CASES IN HILARY TERM

1822,

*TAYLOR
against
HICKING.*

he was declared a bankrupt, but having resisted the commission, the Vice-Chancellor made an order, that he should be at liberty to try its validity in an action of trover to be brought against the assignees. At that trial *Gregory* proved that he was in *England* in *April*, 1814, and his counsel insisted, that there was no valid petitioning creditor's debt, inasmuch as it was barred by the statute of limitations; but the jury found a verdict against him. Copies of the several writs, with the continuances, were given in evidence on the part of the plaintiffs, and the point was reserved as to the legal effect of those proceedings. It was stated in the affidavits, on the part of *Gregory*, that these writs were not delivered out of the secondary's office before the 19th *March*, 1821, which was two days after the above action was commenced. They were all filed together on the last day of *Trinity* term, in the King's Bench treasury, and a roll of the proceedings, with the continuances on the writ of pluries, was carried in and docketed on the 11th of *July*, 1821. It appeared now, upon the affidavits produced on the part of the plaintiffs, that the writs were left at the secondary's office, between the beginning of *Michaelmas* term, 1812, and end of *Hilary* term, 1813, for the purpose of being returned by the then sheriffs; and that before the end of that term, a return was indorsed, that neither of the defendants was to be found in the bailliwick. *Campbell*, on behalf of the defendant, *Gregory*, in last *Michaelmas* term, obtained a rule nisi for setting aside the return to the special capias, alias and pluries in this case, for irregularity, with costs. The Court, after hearing *W. E. Taunton* against the rule, and *Campbell* and *E. Alderson* in support of it, ordered it to be referred to the Master, to enquire, whether, according to the practice

practice of the Court, these writs had been duly returned and filed, so as to save the statute of limitations; and the Master having now reported that they had been duly returned for that purpose,

1822.

TAYLOR
against
HOPKINS.

Campbell now excepted to the report, and contended, that a writ was not duly returned by having a return indorsed upon it, but by being delivered out of the secondary's office as returned. Here, therefore, no return was made till 19th *March*, 1821, a period after the statute of limitations had actually run. In this case, then, when the docket was struck, the petitioning creditor's debt was barred by the statute, and the validity of the commission is to be made subsequently to depend upon the will of the under-sheriff, in delivering or refusing to deliver out the writs; it being clearly in his power, after the sheriffs have been six months out of office, to refuse to make any return to the writs. In *Harris v. Woolford* (*a*) it was held, that, in order to save the statute of limitations, it was necessary to shew, not only that a writ was sued out in time, but also that it was returned.

The Court, however, thought, that there was no good reason for altering the established practice, which was, to consider such returns as regular, and the rule was discharged.

Rule discharged.

(*a*) 6 T. R. 617.

1822.

*Friday,
February 1st.*

**Doe on the Demise of THOMAS NETHERCOTE
against FRANCIS BARTLE.**

By marriage settlement certain lands were limited to the husband for life, remainder to the wife for life, and remainder to their issue. Afterwards certain freehold land in the same parish descended to the husband in fee. There was no issue of the marriage, and the husband being in possession of the freehold lands under the settlement, and the other land of which he was seized in fee, devised to his wife for life all his freehold and copyhold lands of which he was then in the immediate possession,

and also all his reversionary estate, expectant on the death of his mother, in certain other lands therein mentioned, and after the decease of his wife, he devised the same to his daughter in fee, and all other his real and personal estate he devised to his wife, her executors and administrators : Held, that the freehold land which the husband held under the settlement, passed under the particular devise in the will to the wife for life, and after her death to his daughter in fee, although the wife would have taken the same estate in those lands under the settlement. Where, by the custom of a manor, a feme covert was allowed by will to pass her copyhold lands, the same having been previously surrendered by husband and wife, (the wife having been examined separate and apart from her husband, and consenting thereto,) to use of her will; and a feme covert being seized of copyhold lands in the manor, made her will subsequently to the 55 C. 3. c. 192., and there was no surrender to the use of her will : Held, that the copyholds did not pass by the will, the 55 C. 3. c. 192. having only supplied the want of a formal surrender, and the surrender in this case being matter of substance, and requiring to be accompanied by the separate examination of the wife.

EJECTMENT, to recover ten acres and a half of arable land, in the parish of Soham, in the county of Cambridge, three acres, part thereof, being copyhold of the manor of Mildenhall, and the residue freehold. At the trial, before Dallas C. J. at the Summer assizes, 1821, the jury found a verdict for the plaintiff, subject to the opinion of the Court, on the following case.

Thomas Nethercote (the great uncle of the lessor of the plaintiff) being seised in fee simple of six acres and a half, part of the freehold lands above mentioned, by an indenture of the 2d October, 1741, settled the same to the use of himself for life, with remainder to the use of *Mary* his wife, for life; remainder to the use of the heirs of his body, on the body of the said *Mary* to be begotten. After this settlement, the remaining acre of freehold descended to him in fee simple. On the 19th February, 1758 (being then in possession of the said

six and a half acres, under the settlement, and also of other land in the same parish, of which he was seized in fee) he made his will, and devised as follows: "I devise unto *Mary*, my wife, all my freehold and copyhold lands, of which I am now in the immediate possession, lying in the several parishes of *Soham* and *Fordham*, in the county of *Cambridge*, and also all my reversionary estate, expectant on the death of *Mary Nethercote*, my mother, of and in certain other freehold and copyhold messuages, lands, &c., situate in *Soham* and *Fordham* aforesaid; to hold the said freehold and copyhold premises unto my wife, and her assigns for her life, (charged as in the will mentioned;) and after the decease of my wife, then I devise the said freehold and copyhold messuages, lands, &c., unto my daughter, *Mary Nethercote*, her heirs and assigns for ever. And all other my real and personal estate, subject to the payment of my funeral expenses and just debts, I devise and bequeath unto my said wife, her heirs, executors, and administrators."

T. Nethercote died soon after making his will, leaving *Mary Nethercote*, his widow, and *Mary Nethercote*, his daughter and only child, him surviving. The daughter, who survived the mother, afterwards married *William Chatteris*, and died in 1790, leaving issue one child only, viz. *Mary*, afterwards the wife of *Robert Young*. Upon the death of her mother, *Mrs. Young* entered into the possession of the freehold lands, and continued seized thereof till her death. The copyhold lands descended to *Mrs. Young* from her mother, and she was admitted thereto in fee simple, according to the custom of the manor of *Milden-hall*. After her marriage, she made her will, bearing

1822.

Dox dem.
NETHERCOTE
against
BARTLE.

1822.

Dec'd Mrs.
Nethercote
against
Barrett

date the 29th of *January*, 1817, by which, with the consent of her husband, testified by his signature thereto, she devised all her copyhold lands in the manor of *Mildenhall*; to which she had been admitted (which included the copyhold lands in question) to *William Pollett Chatteris* and his heirs; for ever, and in case of his death under age, then to her husband and his heirs, for ever. The will was signed both by Mr. and Mrs. Young; in the presence of, and attested by three witnesses, but there was no surrender passed to the use of Mrs. Young's will. In the manor of *Mildenhall*, there is a custom enabling a feme covert to pass by her will copyhold lands which have been surrendered to the use of the wife's will, by the husband and wife, the wife being examined by the steward, separate and apart from the husband, and consenting. The lessor of the plaintiff is the heir at law, ex parte materna of *Mary Young* on the part of her grandfather, but not on the part of her grandmother, and the heir, according to the custom of the manor of *Mildenhall*, of Mrs. Young. The question for the opinion of the Court, as to the six and a half acres of freehold, was, whether they were included in the particular devise in the will of *Thomas Nethercote*, and passed under that devise to his wife, for life, and after her decease to his daughter, in fee. And as to the copyholds, whether by virtue of the act of the 55 Geo. 3. c. 192., the will of Mrs. Young was effectual to pass them, though there had been "no surrender to the use thereof.

Biggs Andrews, for the lessor of the plaintiff. The freehold land passed, under the particular devise in this will, to the wife for life, and after her death, to the daughter

daughter in fee, and consequently the lessor of the plaintiff, as the heir at law of Mrs. Yeung, is entitled to recover. The question is not between the devisees and the heir, but between two devisees. By the particular clause, the testator devises the lands of which he is in the immediate possession. Now he was in the immediate possession of the freehold land in question, and consequently, there can be no doubt that this land would pass under this clause, had it not been that the wife took the same interest, and the daughter nearly the same interest under the settlement. That circumstance, however, is not sufficient to shew, that the testator intended this land not to pass, where the words of the particular clause are clear and unambiguous. Besides, there is no inconsistency between the settlement and the will, for the testator had the full control over the fee, with the exception of the life estate to his wife, and he might therefore naturally suppose, that he might devise it, subject to that estate as he pleased. The will, as far as it relates to the only interest which was not in the testator, is confirmatory of the settlement. It is clear, that these lands would not have passed by a devise of "All the lands of which the testator was not in the possession." And if so, they must pass by the devise in this will, of "All the lands of which he was in the possession." The question as to the copyhold premises, depends upon the 55 G. 3. c. 192. The preamble of that statute recites, that by the custom of certain manors, copyhold estates of such manors passed by the last will and testament of the copyhold tenants thereof, declaring the uses of surrenders made for that purpose, and that much inconvenience had arisen from the necessity of making such surrenders; and then it enacts, that where,

1842.
—
Dor. den.
Nethercott
against
Bartle.

1822.

Dox dem.
NARRACOTT
against
BARTLE

any copyhold tenant of such manor may by will dispose of his copyhold tenements, the same having been surrendered to such uses as should be declared by the will, every disposition made by such will shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the will of such person, as the same would have been if a surrender had been made." The legislature intended to supply a surrender which the person making the will might have made, but which, through accident or ignorance, had been omitted. It did not intend to give to individuals powers over their estates which they did not possess before; now, it is part of the policy of the law, that a feme covert shall not make any disposition of her real property but under certain regulations. First, She cannot dispose of it without the concurrence of her husband, for a fine levied by a married woman, described as such, is altogether void. Secondly, the law has provided, that she shall not be controlled by her husband to make an improvident disposition of her property against her own will; and therefore the wife must be examined apart from her husband, in order to give effect to any transfer of her property. A feme covert, therefore, cannot dispose of freehold property, except by a matter of record to which her husband must be a party, and she cannot become a party to it, until she has been previously examined apart from her husband. If the construction contended for by the defendant is to be put upon this statute, however, a feme covert may dispose of copyholds by an unattested writing, made either without the concurrence of her husband, or induced by his threats or control. The legislature never could have intended to have made so important

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a distinction between freehold and copyhold property. The statute does not say, that the consent of the husband, or the private examination of the wife shall be supplied, but merely that the surrender shall be supplied. Here, before the passing of the act, both these things were necessary to give effect to the will, and therefore, unless this case be within the statute, the will cannot operate upon the copyhold property. The third section of the act, however, is quite conclusive upon this point, for it provides, "that nothing therein contained shall be construed to render valid or effectual any devise or disposition of any copyhold lands, &c. which would be invalid or ineffectual, if a surrender had been made to the use of the will of a person attempting to dispose of the same by a will." Now, in this case the feme covert could not by a mere surrender, without the concurrence of her husband, and without a previous examination, have made an effectual devise of copyholds, and therefore this will is not rendered valid by the act.

Dover, contra. The reversion of the settled property did not pass under the particular devise to the daughter in fee, but to the wife of the testator under the general residuary clause; and if that be so, the lessor of the plaintiff, who is not the heir at law of the wife of the testator, is not entitled to recover. The words, "of which I am in the immediate possession," are a description of the interest which the testator had in the lands intended to be devised by him, and do not refer to the actual occupation or possession of the land under his life estate. The words of a will must be construed in their legal sense, unless a contrary intent plainly

1822.

 Dox dem.
 NETHERCOME
 against
 BARTLE.

1822.

~~Dec dem.
Metzger
against
Barrett.~~

appear, *Holloway v. Holloway* (*a*), and the testator must, *prima facie*, be presumed to know the law as well as another, *Purefoy v. Rogers*. (*b*) If there had been any ambiguity in the words themselves, it is wholly removed by other words of the sentence, for the testator, after giving the lands of which he was in immediate possession, devises a reversionary estate expectant on the death of his mother, to his wife for life, and to his daughter in fee. Now, in the legal sense of these words, the reversion was not in the immediate possession of the testator; it was vested in interest, but not in possession. Estates in possession are here put in direct opposition to estates in reversion by the testator. It is quite clear, therefore, that the testator did not intend, that the reversion should pass by this clause, for if he had intended it, he would have devised it in express terms. By this construction, full effect will be given to all the words of the will. The testator had, besides the settled property, other lands in the same parish, of which he was seised in fee. Of that he was, in every sense, in the immediate possession, and that land alone, he intended to devise to his wife for life, and to his daughter in fee. But if the construction contended for on the other side prevail, then the testator must be taken to have given to his wife the same estate in that land which she already possessed under the settlement, viz. a life interest. It is clear, that the reversion passed by the residuary clause, *Chester v. Chester* (*c*), *Dec dem. Lord Chalmondeley v. Weatherby*. (*d*) Besides, if the residuary clause is not to operate upon this reversion, there is no estate upon which it can operate. Then as to the copyhold, this is

(*a*) 5 *Ves. Jun.* 401.(*b*) 8 *Saund.* 395.(*c*) 3 *Pcre W.* 55.(*d*) 11 *East.* 327.

a case in which the want of a surrender is supplied by the 55 G. 3. c. 192. The words of the first section are very large and comprehensive, and are clearly sufficient to comprise the present case. In *Taylor v. Phillips* (*a*), it was doubted whether a surrender by a wife in her husband's presence was not good, although it did not appear that she was separately examined. In this case the husband signed, and was a party to the will; and it is not necessary that the wife should be examined, for that is a mere matter of form. The surrender and the will are not concurrent acts. The surrender may be made years prior to the will, yet the examination must take place prior to the surrender, and the steward can know nothing of the will which is not in existence. Such a surrender passes no interest at the time, and is very different from a surrender of one to the use of another person, which takes effect immediately, and cannot be revoked. In the latter case, the examination is matter of substance, for a wife, under the influence of her husband, might otherwise sell her estate during her life, and deprive herself of support during widowhood. Such surrenders, however, are not affected by the statute. But in this case, nothing passes during her life, she only exercises a power with the consent of her husband, which she herself possessed before marriage. The *jus proprietatis* after the marriage is in her, and the *jus possessionis* in her husband, and they are both parties to the appointment. Before the 55 Geo. 3. c. 192. frequent applications were made to courts of equity to supply surrenders, and great litigation followed, and the object of the act was to remedy this incon-

1822.
Dox dem.
Narratives
against
Parry.

1892.

Deo dom.
Nestoracum
against
BARTLE

venience, by making one general and uniform rule applicable to surrenders in all testamentary cases. And the words of this act are sufficiently large to include all.

Andrews, in reply, was desired by the Court to confine himself to the first point. The defendant is not assisted by taking the words "of which I am in the immediate possession," to refer to the interest which the testator had in the lands, and not to the actual occupation. The testator was in the immediate possession of an estate for life in the lands, and they must therefore be included in the words of this particular clause, even under that interpretation of them. No argument is furnished for the defendant, from the testator's having given another reversionary interest; in express terms, because whether this reversion passed by the particular or the residuary clause, it must be held to have passed by a devise of the lands themselves. It is true, that if these lands did not pass by the particular, they passed by the residuary clause; but the words of the particular clause are sufficiently comprehensive to pass them, and it cannot be shewn that the testator meant not to include them in that clause.

ABBOTT C. J. I am of opinion that the plaintiff is entitled to recover both the freehold and the copyhold lands. The question, as it regards the freehold, depends entirely upon the construction of the particular will; the question, as it regards the copyhold, is one of general and extensive importance. The words of the particular clause in the will are these: "I devise unto *Mary*, my wife, all those my freehold and copyhold lands, &c., of which I am now in the immediate possession,

sesson, lying in the several parishes of *Soham* and *Fordham*." I am quite satisfied that these words are sufficient in themselves to comprise the freehold land in question. There could have been no doubt indeed upon the subject, if the person designated *to take*, had not been the same person who would have taken under the settlement; it appears to me, however, that the words of description are not to receive a different construction, on account of the character of the person to whom the gift is made. I am by no means clear, that the testator meant to convey the freehold land by the residuary clause, and that being so, I think that we are bound to give effect to the clear and unambiguous words of the particular clause. As to the copyhold, I agree with the counsel for the defendant, that the words of the 55 G. 3. c. 192. are large enough to comprise the present case; but it does not thence necessarily follow that the statute does comprise this case. It is laid down by Lord *Coke* (a), "That a case out of the mischief intended to be remedied by a statute shall be construed to be out of the purview, though it be within the words." Now I am quite satisfied that this case is out of the mischief intended to be remedied. The statute recites, "that, by the custom of certain manors, copyhold estates of such manors passed by the will of copyhold tenants thereof, declaring the uses of surrenders made for that purpose, and that much inconvenience had arisen from the necessity of making such surrenders," the enactment, therefore, was to prevent that inconvenience which had been found to arise from the necessity of making such surrenders. Now no inconvenience had been found to

1882.
Dost dom.
Nemours
against
BARTLE.

(a) 2 Inst. 386.

1822.

Dox dem.
Navarre
against
Barrell.

arise from the necessity of making a surrender, in order to give effect to the will of a married woman, where it was a part of the custom of the manor that she was to be examined by the steward. The inconvenience contemplated by the statute, was the necessity of a surrender by an adult, not under any legal incapacity, in order to render a devise by him of copyhold effectual. In the latter case, the surrender is mere matter of form and ceremony. Here, the surrender is matter of substance. I am of opinion, that the legislature intended by this statute to supply the want of a mere formal surrender only. If we were to hold that the statute extended to a case like the present, we should be introducing, instead of remedying a mischief; for I consider the separate examination of the wife, at the time of the surrender, by the steward, according to the custom of the manor, as a guard and protection which the law has provided, to prevent the wife from making an imprudent will under the control of her husband. That protection is not, perhaps, so necessary in the case of a will as in the case of an immediate sale. In the latter case, the wife deprives herself of all present and future means of subsistence; but although that is not so in the case of a will, she is still entitled to that protection which the law allowed her, to prevent her being compelled by her husband to make an improvident disposition of her property in favour of himself or those connected with him. I think that if we were to put the construction contended for on this statute, we should deprive feme covert of that protection which the law generally extends to them with respect to their freehold property, and which, by the custom of this and most other manors, is expressly allowed them with respect to their copyhold property.

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I am therefore of opinion, that although this is a case within the words of the statute, it is not within the mischief intended to be remedied, and therefore is out of the purview.

1822,
Don dem.
Nervousness
against
Bastard.

BARTLEY J. To entitle a devisee to specific property, it is incumbent upon him to shew that there are, in the will, words sufficiently large to pass that property. When that is the case the property will pass, unless a contrary intention appears from other parts of the will. The onus is, in the first instance, on the devisee, but when he has made out that the words are sufficiently large to pass the property, the onus is shifted, and cast on the opposite party. In this case, the testator devises all the freehold and copyhold lands of which he was in the immediate possession. At the time of making his will, he was in the immediate possession of certain lands, of which he was seized in fee simple, and of certain other lands, of which he was seized for life, with reversion to himself in fee, expectant on his mother's death; he has therefore used words sufficiently large to include the property in question, unless it can be collected from other parts of the will, that he intended that the property should not pass; and it has been contended that it cannot pass, upon two grounds, first, because the will would then be inoperative as to the settled property, because he gives the property to his wife for life, with remainder to his daughter in fee, and, independently of the will, the wife had, in the settled property, an estate for life, and the daughter an estate in tail; and in case of no other issue, that she would take the reversion in fee by descent. There are many instances, however, in which a testator has devised settled property to a person

1822.

Dox dem.
NETHERCOTE
against
BARTLE.

son entitled to take under the settlement, and no case has been cited in which that circumstance has been held to prevent the devise taking effect, where the words are sufficiently large to comprehend the property; and there being no authority upon the subject, I think we ought not so to hold in this case. Then, as to the residuary clause, it seems to me, that the testator did not in that clause contemplate the property in question. He uses general words for the purpose of passing all his property. In the early part of the will, he describes specifically a reversionary interest which he had expectant on the death of his mother, and if he had intended by the residuary clause to pass specific property, I think he would have used a specific description of it. The use of the general words in the residuary clause does not satisfy my mind that the testator then had in contemplation the property in question. If there had been no residuary clause, the property in question undoubtedly would have passed by the particular clause; and I know of no instance in which the general words of a residuary clause have been held to controul and limit the operation of a preceding particular devise. As to the other question, I have no doubt whatever. The enacting part of the statute contains large and general words, but the recital refers to the particular inconvenience intended to be remedied. That inconvenience was, that a will expressly devising copyholds was inoperative where the testator had omitted to make a surrender to the uses of his will. The surrender in such a case was a mere matter of form, and I am of opinion that the statute meant to supply the want of a surrender in such cases only, and not where it was a matter of substance. Here the surrender, coupled with the

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separate examination of the wife, is a matter of substance. I am quite satisfied that the legislature did not mean to take away that protection which such a surrender is calculated to afford to feme coverts. It is the duty of the stewards of the manors in such cases to take care that no feme covert is suffered to surrender an estate to the uses of a will without previously apprising them of the consequences of that act. For these reasons, I am of opinion that the lessor of the plaintiff is entitled to recover both the freehold and copyhold land.

1822.

Doe dem.
NETHERCOTE
against
BARTLE.

HOLROYD J. It appears to me that the testator in this devise had in contemplation, not only lands of which he was in possession, but likewise lands of which he was not in possession; and he there makes use of words applicable to both. The lands of which he was in immediate possession were one acre, (with respect to which there is no question,) and six acres and a half of freehold, of which he was seised for life, with remainder to his wife for life, with remainder in special tail, and the reversion in fee to himself. He had besides land of which he was not in the immediate possession, namely, that which was to come to him after the death of his mother; and, having these in his consideration, he gives all the lands of which he was in the immediate possession, and also the land expectant on her death, to his wife for life, with remainder to his daughter, *Mary Nethercote*, her heirs and assigns, for ever. Now, the words are sufficiently large to comprehend both. I apprehend it to be a clear principle of law, that where words are unequivocal, and clearly comprehend a particular species of property, they are not to be narrowed and restrained by mere conjecture.

1822.

Dox dem.
NETHERCOTE
against
BARTLE.

conjecture. I am therefore of opinion, that the six acres and a half are included in the devise of lands of which he was in the immediate possession. With respect to the other point, it seems to me clear that the statute only meant to do away with the necessity of making a surrender, which was mere matter of form. Assuming the words of the enacting part of the statute to be sufficiently large to comprehend a case of this kind, they must still be construed with reference to the mischief intended to be guarded against. That mischief was the necessity of making a mere formal surrender. Now, if before the statute, the steward had taken a formal surrender without examining the wife apart from her husband, nothing would have passed under the will. I am of opinion that the statute merely supplies the surrender, and not that examination of the wife which, by the custom of this manor, was necessary previously to the passing of the surrender. I am quite satisfied that the legislature did not intend to deprive married women of that substantial protection which, by the custom of this and other manors, is extended to them in cases of copyhold, and which is analogous to the protection allowed them by the law of England in cases of freehold property. For these reasons, I am of opinion that the lessor of the plaintiff is entitled to the judgment of the Court.

BEST J. concurred.

Judgment for the plaintiff.

1822.

**MARSH, Executor of QUINLAN against C. M.
BULTEEL.**

COVENANT upon a deed, whereby the parties agreed to submit certain differences to the award of arbitrators. The first count of the declaration stated the defendant's covenant to obey, abide by, and perform the award, and that he would not by affected delay, or otherwise hinder, or prevent the arbitrators from making their award. It then stated, that the arbitrators duly made their award, and that they thereby directed, that the defendant should pay to the plaintiff certain sums therein mentioned. The breaches assigned were, that the defendant did not pay those sums of money. The second count was founded upon the same deed, and assigned as a breach, that the defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed with the seal of the defendant, after reciting as therein was recited, did revoke, abrogate, and put an end to, and determine all and every arbitration or arbitrations, reference or references to arbitration, deed or deeds of submission,

defendant was entitled to judgment, although it appeared by the plea, that he had been guilty of a breach of the covenant to abide by the award by revoking the authority of the arbitrators, the plaintiff being entitled to recover damages only in respect of the cause of action stated in his declaration, and not in respect of a cause of action disclosed in the plea.

The second count of the declaration stated the deed of reference, and then averred that defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed by him, after reciting, as was therein recited, did revoke the authority: Held, upon demurrer, that this was an allegation, not of the mere legal effect of the deed, but of the fact of revocation, and that it was unnecessary to state that the arbitrators had notice of the revocation, that being necessarily implied in the averment, that the defendant had revoked the authority.

agreement

Declaration stated that defendant covenanted to obey, abide by, and perform an award, and that he would not prevent the arbitrators from making their award. It then stated that the arbitrators made their award, and thereby directed the defendant to pay a certain sum therein mentioned; and alleged as a breach of the covenant that the defendant did not pay the sum awarded. Plea, that before the award, defendant, by deed, revoked the authority of the arbitrators, of which revocation they had notice: Held, upon demurrer, that he had been guilty of a breach of the covenant to abide by the award by revoking the authority of the arbitrators, the plaintiff being entitled to recover damages only in respect of the cause of action stated in his declaration, and not in respect of a cause of action disclosed in the plea.

1822.

MARSH
against
BULTELL.

agreement or agreements, contract or contracts to refer to the arbitration or award of the said arbitrators, whereby they, the said arbitrators, were hindered and prevented from making their said award, and whereby the said plaintiff lost, and was deprived of the benefit that he would otherwise have derived from an award. The defendant pleaded to the first count, that before the arbitrators made their award, he, the defendant, by deed, revoked their authority, of which deed and revocation of their authority, the arbitrators before the making of the award in the first count mentioned, had notice. To this plea the plaintiff demurred. The defendant demurred to the second count of the declaration, and assigned for cause, that it was not alleged, that the arbitrators had notice of the revocation, nor was it shewn how the defendant hindered them from making their award.

Chitty, for the plaintiff. The plaintiff is entitled to judgment on the demurrer to the plea to the first count. The ground of action stated in that count, is the breach of the covenant to perform the award. The plea shews the award to be void, but admits that the defendant has committed a breach of another covenant set out in the declaration, by which the parties covenanted not to prevent the arbitrators from making their award. In *Charnley v. Winstanley* (a), this Court refused to arrest the judgment in an action brought upon an arbitration deed, where one of the parties to the submission had become a feme covert subsequently to the submission and before the award: the breach alleged in the declar-

(a) 5 East, 266.

ation,

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against
BUTLER.

ation, being non-payment of money pursuant to the award, on the ground, that it appeared upon the whole record, that one of the parties had been guilty of a breach of the covenant, not to abide by the award, *Le Bret v. Papillon.* (a) Now, here it appears by the defendant's plea, that he has broken that covenant by revoking the arbitrators' authority, and therefore that case is expressly in point. Secondly, the plaintiff is entitled to judgment on the last count. For thereto an actual revocation of the authority of the arbitrators is alleged, and that is sufficient. In *Vynior's case* (b), which was an action on a bond, the defendant craved oyer of the condition, which was to abide the award of Mr. *Rugge*, and then pleaded, that he by his deed "revoked and abrogated the authority of the arbitrator," to which the plaintiff demurred, and it was resolved, that the plaintiff need not aver, that the arbitrator had notice of the countermand, for that is implied in these words, "revocavit et abrogavit omnem autoritatem," for without notice there is no revocation or abrogation of the authority, therefore, if there was no notice, it should be found for the defendant, as if a man pleads quod feoffavit, dedit, et dimisit pro termino vitæ, it implies livery, for without livery, it is no feoffment gift or demise. Now, that is an authority expressly in point to shew, that the last count is properly framed.

Gaselee contrâ. The plea is a good answer to the cause of action alleged in the first count, which is substantially the non-payment of the money awarded. The plea shews that the award is wholly void. If the argument

(a) 4 East. 502.

(b) 8 Co. 162.

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on the part of the plaintiff is to prevail, he will derive the same advantage from this action as if the award had been good. At any rate, that would be the case, if the plaintiff had declared in debt upon the award, for in that case he would have been entitled to recover the whole sum awarded. (The Court then desired him to proceed to the other point.) The plaintiff ought to have stated in the last count, that the arbitrators had notice of the deed of revocation. The allegation is, that the defendant, by a deed signed and sealed by him, reciting as therein was recited, did revoke. The plea, therefore, merely states the legal effect of the deed. Now the mere execution of such a deed, which purports to revoke the authority of the arbitrators, would not operate as a revocation without express notice, and therefore the second count is bad.

ABBOTT C. J. I am of opinion, that the defendant is entitled to judgment upon the demurrer to the plea to the first count of the declaration. The ground of complaint in that count is the non-payment of money pursuant to the award, or in other words, a breach of the covenant to perform the award when made. It appears by the plea, that the defendant, by countermanding the authority of the arbitrators, has broken the covenant to abide by the award, or that whereby he stipulated not to hinder the arbitrators from making an award; and it is urged on the part of the plaintiff, that although this plea is an answer to the cause of action suggested in this count, yet that, inasmuch as it appears upon the whole record that the defendant has been guilty of a breach of covenant, the plaintiff is entitled to judgment upon that count, and the case of *Charnley v. Winstan-*

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1822.

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against
BUTTECKE

ley (a) has been relied upon. That case, however, is very distinguishable from the present. There it appeared upon the face of the plaintiff's count, that the award was made after one of the parties to the submission had become a feme covert. Her marriage was in itself a revocation of the authority of the arbitrators, and therefore was a breach of the covenant to abide by the award. In this case, the breach of that covenant is disclosed only by the defendant's plea, and it never has been held, that a plaintiff who seeks to recover damages for one ground of action stated in his count, is entitled to recover in respect of another disclosed by the defendant's plea. I am of opinion, that a plaintiff can recover only in respect of the ground of action stated in his declaration. As to the demurrer to the last count, I cannot distinguish this from *Vynior*'s case. There the allegation was, that the party by his deed revoked the authority of the arbitrator, and the decision was, that that allegation imported notice to have been given to the arbitrator, and that being so, the case is expressly in point with the present. If the declaration in this case had alleged, that the party had sealed and delivered a certain deed, containing therein as follows, and setting out the deed, and thereby revoked the authority of the arbitrators, it would not have been sufficient, for that would only have been an allegation of the effect of the deed. Here the allegation is, that there was an express revocation by deed.

BAYLEY J. It is laid down by Lord *Coke* in *Vynior*'s case, that "there is a difference when two things

(a) 5 East, 266.

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BULTELL

are requisite to the performance of an act, and both things are to be done by one and the same party, as in the case of feoffment, gift, demise, revocation, &c., and when two things are requisite to be performed by several persons, as in the case of a grant of a reversion; attornment is not implied in it; and yet without attornment the grant hath not perfection; but, forasmuch as the grant is made by one, and the attornment is to be made by another, it is not implied in the pleading of the grant of one; but, in the other case, both things are to be done by one and the same person, and that makes the difference." Now, here the allegation is, that the defendant by deed revoked the authority, and that is a double allegation, importing, first, that the party executed a deed of revocation, and, secondly, that he gave notice to the arbitrators. The plaintiff, therefore, may put in issue, either the execution of the deed, or the fact of notice. I think, therefore, that *Vynior's* case is an express authority to shew that the last count of the declaration is properly framed, and for the reasons given by my Lord Chief Justice, I am also of opinion, that the defendant is entitled to judgment on the demurrer to the plea to the first count.

HOLROYD J. I am of opinion that the defendant is entitled to judgment upon the demurrer to the first plea. This case is very distinguishable from *Charnley v. Winsladey* for the reasons already given by my Lord Chief Justice; and I think that the plaintiff, who, by his declaration, seeks to recover damages for the causes of action therein stated, ought not to be allowed to recover in respect of another cause of action, disclosed by the defendant's plea. As to the demurrer to the last count,

Vynior's

Vynior's case is an authority to shew that it is sufficient to allege that the party by deed revoked the authority without expressly averring that notice of revocation was given to the arbitrators, and that being so, the judgment must be for the plaintiff upon that count.

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against
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Judgment for the defendant upon the demurrer to the plea to the first count, and judgment for the plaintiff upon the demurrer to the last count. (a)

(a) *Best J.* was absent at Chambers.

DRONEFIELD against ARCHER.

Monday,
February 4th.

TINDAL, in *Michaelmas* term last, obtained a rule nisi for taxing the defendant's costs under 43 G. 3. c. 46. s. 3. the plaintiff having held the defendant to bail without any reasonable or probable cause. It appeared upon the affidavits, that the plaintiff, in *September*, 1817, entered into the defendant's service under a verbal contract, under which he claimed, as due from the defendant, a sum of 23*l.* and upwards. Against this demand, however, the defendant had a set off, which was proved. And it further appeared, that on the 8th *July*, 1820, when a tender of 2*l.* 19*s.* 8*½d.*, as the balance due, was made, the plaintiff refused to receive it, claiming as the balance then due to him, the sum of 6*l.* 19*s.* 8*½d.* only. The jury were of opinion at the trial, that this was the true balance, and thereupon found a verdict for the plaintiff, damages 4*l.*, in addition to the sum tendered. On the 10th *July*, the defendant was held to bail in the sum of 15*l.* and upwards.

Where, in the account between plaintiff and defendant, there are items clearly due on both sides, it is an arrest without reasonable and probable cause within 43 G. 3. c. 46. s. 3. if the plaintiff arrests and holds the defendant to bail for the amount due to him without, at the same time, giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance.

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D. F.

1822.

DRAONFIELD
against
Austin.

D. E. Jones shewed cause, and contended that here there was a reasonable and probable cause for the arrest, the amount due from the defendant being upwards of 15*l.* As to the set off, it was not material, because the statutes of set off are not compulsory, and the plaintiff could not be certain whether the defendant would set off the debt due to him. In *Brown v. Pigeon* (*a*), it was held, that where a party who owed another 23*l.*, and had a debt of 10*l.* due to him, arrested the other party for 10*l.*, although upon the balance no debt whatever was due to him, no action could be maintained for a malicious arrest.

Tindal contra was stopped by the Court.

Per Curiam. It is an arrest without reasonable or probable cause, if, where the plaintiff knows that the defendant has a set-off reducing the balance below 15*l.*, he holds the defendant, nevertheless, to bail for the whole amount. The effect of the statute of set-off is to make the balance really due the debt for which the arrest ought to be made. The stat. 43 G. 3. c. 46. s. 3. directs, that if a plaintiff holds the defendant to bail in any amount without reasonable or probable cause for so holding him to bail, he shall pay costs. Now, what is a reasonable and probable cause for arrest? Is it not the obtaining security for that which is fairly due? Now that must be the balance. It is said, that a defendant is not bound to set-off the debt due to him. That is a very good reason why the plaintiff should be allowed to include in his declaration the whole sum due to him,

(*a*) 2 Campb. 594.

but

but it is no ground for contending that a party should thus be deprived of his liberty. Suppose a plaintiff has made advances to a merchant to the amount of 100,000*l.*, the true balance being, after allowing the defendant's set-off, only a small sum, can it be contended that he may be held to bail to the full amount of the advances made? If so, it might be impossible for him to obtain bail; and he might, by lying in prison, commit an act of bankruptcy. In this case the plaintiff, when the tender was made to him, admitted the balance to be under 7*l.*, and yet, notwithstanding, two days after that, he caused the defendant to be held to bail for 15*l.* and upwards. He had therefore no reasonable or probable cause for holding him to bail in that amount. The rule must be made absolute.

Rule absolute. (a)

(a) In *Feeley v. Reed*, on a later day in the term, a question arose, whether executors, having held a party to bail without reasonable or probable cause for a debt due to their testator, were within the act. And the Court held that they were, because an action for a malicious arrest would lie against them, and this was an analogous remedy.

1822.

DRONFIELD
against
ARCHER.

1822.

*Tuesday,
February 5th.***COBB, Assignee of MONSEY, a Bankrupt, against
SYMONDS and Another.**

A smuggler may be a trader within 1 Jac. 1. c. 15. s. 2. as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. A penalty due to the crown is a debt within 21 Jac. 1. c. 19. s. 2., and, therefore, where a trader lay in prison above two months, being unable to pay exchequer penalties for smuggling: Held that it was an act of bankruptcy.

TROVER for cattle, goods, and chattels, the property of the bankrupt before his bankruptcy. Plea general issue. At the trial before *Dallas C. J.* at the last Summer assizes for the county of *Norfolk*, the principal questions were, as to the trading and act of bankruptcy. As to the first, the only instances of buying and selling which were proved, were the purchase of large quantities of smuggled goods, and the sale of those articles by retail. No act of buying and selling legal goods was given in evidence. The act of bankruptcy consisted in lying in prison above two months at the suit of the crown, for penalties incurred by him in consequence of his smuggling transactions. The Lord Chief Justice thought, that as to the first, the case fell within *Ex parte Meymott* (a), and that as to the second, the penalty might properly be considered as a debt, and so the act of bankruptcy was sufficient. The plaintiff accordingly had a verdict. *Frere Serjt.* in last *Michaelmas* term obtained a rule nisi for entering a nonsuit. And now,

Blossett Serjt., Storks and Rolfe, shewed cause. In this case there was a sufficient trading, unless the illegality of it makes the difference. The statutes relating to bankruptcy, speak of the bankrupt as an offender, and the preamble to 1 Jac. 1. c. 15. speaks of such as wil-

(a) 1 Att. 197.

fully

fully and wickedly become bankrupts. And it would surely be absurd to argue, that an additional offence, by which he is more wickedly and wilfully a bankrupt, could prevent him from having a commission taken out against him. Suppose a person trades without having served an apprenticeship, could it be contended, that this would prevent him from being a bankrupt? Here, he seeks his living by buying and selling, and the very circumstance that his trade is illegal, puts his estate in greater danger, and requires that his real creditors, whose debts are unaffected by the illegal transactions, should have this protection. The only effect of the smuggling transactions would be to prevent the debts tainted with it from being received or proved under the commission. The object of the bankrupt laws was to protect the meritorious creditors, and prevent them from being placed in jeopardy by the improper speculations of their debtor. The case *Ex parte Meymott* is an express authority in point, and has been uniformly acted upon. In 1806, *Johnson* the smuggler was made a bankrupt, and this point was never taken as an objection to the commission. As to the act of bankruptcy, it is clear, a penalty is a debt due to the crown, and the 21 Jac. 1. c. 19. s. 2., which makes the lying in prison two months an act of bankruptcy, is quite general. This is clearly as much within the mischief to be remedied as any ordinary debt.

1822.

*Coss
against
SYMONDE.*

Scarlett, Frere, Serjt., and Robinson contrâ. Nothing can be done under such a commission as this. For all the transactions in which the bankrupt was engaged, were illegal, and so the debts due to him under this illegal trading could not be assigned. It does not appear that *Johnson's* case was contested. In *Ex parte Meymott*,

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1822.

Case
against
Stmorts.

Meymott; this was not the point decided, but merely an obiter dictum of Lord *Hardwicke*. An infant cannot be made a bankrupt, *Rex v. Cole* (*a*), and the reason given is, because he cannot contract debts. Here, the debts contracted are not recoverable, being tainted with smuggling. As to getting his living by buying and selling, that must surely mean by a legal buying and selling. Why should an individual like this have the benefit of a certificate to protect himself from any future demands? Suppose the case of a receiver of stolen goods, who equally gets his living by buying and selling them; could he be made a bankrupt as a trader? No person could, under the circumstances of this case, have given credit to him as a trader. As to the second point, the statute only speaks of arrest for a debt, and says nothing of penalties due for offences committed. A lying in prison for a misdemeanour is not within it, and this is of the same nature.

ABBOTT C. J. The words of the statute 1 Jac. I. c. 15. s. 2. are, that all persons seeking their trade of living by buying and selling, may be made bankrupts; and I think the safest course for us to pursue, will be to give effect to the plain meaning of these words. I can find nothing to satisfy me, that the legislature did not intend to include in them every species of buying and selling, whether legal or illegal. If, therefore, the point was entirely new, I should be of opinion, that this was a sufficient trading within the statute. But fortified as I am by the opinion of that very eminent lawyer, Lord *Hardwicke*; I entertain no doubt on the subject.

(a) 1 Lord *Reym.* 444.

• It

It is very true, that this was not the point decided in *Ex parte Meymott* (a), but Lord *Hardwicke* there assumes it as a proposition incapable of being denied, and builds his argument upon it. On the other point, I am clearly of opinion, that a penalty due to the crown is a debt within 21 Jac. 1. c. 19. s. 2., and that the lying two months in prison under it in the present case, was a sufficient act of bankruptcy. The rule must therefore be discharged.

1822.

Com
against
S rioters.

HOLROYD J. (b) I am of the same opinion. As to the act of bankruptcy, it is clearly within the statute, for it is equally a proof of a party's insolvency, whether he lie in prison because he is unable to pay a penalty or a debt. As to the question whether this was a sufficient trading, I am of opinion, both on the words of the statute, the authority of Lord *Hardwicke*, and the principle of the thing, that we ought to decide that the illegality of it can make no difference. The words of the statute are general; "persons seeking their trade of living by buying and selling." Now in this case the party did so; and he therefore falls within the words. But it is said that it must be a lawful buying and selling. The statute, however, is entirely silent upon that subject, and it would be very strange, if a party could set up his own illegality, to prevent himself from being made a bankrupt. Lord *Hardwicke*, in *Ex parte Meymott*, puts this case as one without doubt, and appears to refer to it as if there had been a case decided upon the point. As to the principle, it seems to me that traders are liable to greater losses, when the trade which

(a) 1 A&K. 197.

(b) Bayley J. in the Bail Court.

they

CASES IN HILARY TERM

1822.

Case
against
SYMONDS.

they carry on is unlawful, and persons advancing them money are subjected thereby to greater risk. Then if so, the summary jurisdiction of a commission of bankruptcy is peculiarly advantageous in such cases. Upon principle, therefore, it seems to me, this would fall within the mischief intended to be remedied by the statutes against bankrupts. But if that were uncertain, it seems to me that it is quite sufficient that it falls within the words of the clause in 1 *Jac.* 1. c. 15. Upon both points, therefore, I agree with the opinion which my Lord C. J. has pronounced.

BEST J. A man who owes a penalty is a debtor to the king, and I am therefore clearly of opinion, that there was a sufficient act of bankruptcy in this case. As to the other point, the opinion given by Lord *Hardwicke*, in *Ex parte Meymott*, is decisive, and that opinion has been acted on ever since. The original statutes of bankruptcy treat the bankrupt as a criminal, and were intended to give prompt execution against him; and till more modern times, they never contemplated any protection to him. It seems to me, therefore, that a party who actually gains his living by buying and selling cannot be allowed to say, that because that buying and selling was illegal, he is not to be made a bankrupt. This rule must therefore be discharged.

Rule discharged.

1822.

DAWSON *against* LINTON, Esquire.Thursday,
February 7th.

ASSUMPSIT upon several special counts, and also for money paid to the use of the defendant. Plea, general issue. At the trial, before *Richardson J.*, at the last *Lincoln assizes*, the only question was, as to the liability of the defendant to repay to the plaintiff the sum of 20*l.* 14*s.* for a drainage tax. It appeared that the plaintiff had been tenant to the defendant of a farm, situate within a certain district, liable to a drainage tax of 1*s.* per acre. He paid his rent in full to the defendant, and quitted the farm, on the 6th *April*, 1820, but did not pay the drainage tax then due. When he quitted, by the permission of the incoming tenant, he left a stack of wheat on the premises. A demand being in *July* 1820 made on the incoming tenant by the collector for the year's drainage tax, due *April* 6th, 1820, the tenant refused to pay it, and a warrant of distress having been obtained, the plaintiff's stack of wheat was distrained, and in consequence, the plaintiff was obliged to pay the amount of the tax. By the local act it was provided, that the tax should be paid by the tenants of the lands and grounds charged with the same respectively; and that such tenants should and might deduct and retain the same out of the rents payable to their

Where, by a local act, it was provided that a drainage tax should be paid by the tenants of the lands and grounds charged with the same, who might deduct and retain the same out of the rents payable to their landlord. And also, that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear, and if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let in discharge of the tax: Held,

that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenants for the time being. And, therefore, where an outgoing tenant having paid his rent in full, had left property on the premises, which was afterwards distrained for the tax due during his tenancy, and he was obliged to pay it: Held, that he might recover the same in an action against his landlord for money paid.

landlord;

1822.

DAWSON
against
LINTON.

landlord; and also, that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear; and if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let in discharge of the tax. It was contended, at the trial, that the succeeding tenant was liable for the tax, and therefore that the action should have been against him. The plaintiff had a verdict. *Reader*, in last Michaelmas term, obtained a rule nisi for entering a nonsuit. And now

Balguy, who shewed cause, was stopped by the Court, who called on

Clarke and *Reader* to support the rule. The act of parliament directs the tax to be paid by the tenant of the land charged; now that must mean, not the tenant in whose time the tax accrued, but the tenant for the time being; and it is confirmed by the subsequent provision, making the land itself liable if untenanted. Then if so, the incoming tenant should have paid it, and might have deducted it from the next rent. It was his default, therefore, which caused the distress to be taken of the wheat; and consequently the action should have been brought against him. If this were not so, the tenant, by having on the farm the goods of various persons, all of which might be distrained for the tax, might subject the landlord to a variety of actions.

ABBOTT

ABBOTT C. J. It is clear that this tax must ultimately fall on the landlord, and that the plaintiff has paid his money in discharge of it; he has therefore a right to call upon the landlord to repay it to him. I think the meaning of the act was to make the tax payable by the tenant in whose time it became due, and who received the benefit of the drainage. If it had then been paid, the plaintiff might have deducted it from his rent; but as he was not called on to pay it till after the rent had been paid, I think he has now the right to require the landlord to reimburse him. It might be very hard, if the new tenant were to be compelled to advance money to pay the tax for his predecessor, even though ultimately he would be entitled to recover it. Here, the action is only for money paid for the defendant, and not for any special damage arising from the distress. The verdict is therefore right.

1822.

DAWSON
against
LINTON.

Rule discharged.

DOE on the Demise of SUTTON against RIDGWAY.

Friday,
February 8th.

GASELEE applied for a rule calling upon the lessor Where a rule
of the plaintiff to shew cause why, in default of obtained for stay-
payment of the costs of a former ejectment between these ing the pro-
parties within a certain time to be named by the Court, ceedings in
the defendant should not be at liberty to non pros ejectment till
the present ejectment. It appeared on the affidavits, the costs of a
former eject-
ment have been
paid, the
Court will not
interfere, and
permit the defendant in case those costs are not paid before a certain day to be named by
the Court, to non pros the ejectment pending.

that

1822.

Dox dem.
SUTTON
against
RIDGEWAY.

that *Anne Walker*, the person last seised, died *October* 14th, 1801, and that the lessor of the plaintiff filed his bill in equity to recover the premises in 1819, which bill was, on demurrer, dismissed. In *Trinity* term, 1819, he brought an ejectment, and on the trial, at the Summer assizes of that year, was nonsuited. In *Hilary* term, 1820, a second ejectment was brought, and at the trial, at the subsequent *Lent* assizes, the defendant had a verdict. On the 13th *October*, 1821, a fresh declaration in ejectment was delivered, and in *Michaelmas* term last, a rule was obtained, and made absolute, for staying the proceedings until the costs of the former ejectment were paid. These costs had been taxed and were still unpaid. It was admitted that there was not any precedent for such a motion.

Per Curiam. There is no precedent for such a motion as this; and the effect of it would be this, that if the party could not pay the costs within the time limited, he would be altogether deprived of his remedy by ejectment, the twenty years having now expired. We think we ought not to go further than the precedents have already gone in these cases.

Rule refused.

1822.

The KING against the Inhabitants of WIL-
MINGTON.

Saturday,
February 9th.

TWO justices by their order removed *John Moore*, his wife and family, from the parish of *Crayford* to the parish of *Wilmington*, in the county of *Kent*. The sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

The pauper, *John Moore*, never did any act by which he acquired a settlement in his own right. In the year 1814, he was removed with his father, *Thomas Moore*, by an order of two justices, from the parish of *Crayford* to the parish of *Wilmington*, as the place of settlement of the pauper's father, which order was appealed against, and upon the hearing of the appeal confirmed. The pauper, in the same year, returned with his father into the parish of *Crayford*, and was hired by the week to *Sir Henry Crewe* in that parish, in whose service he continued as a weekly servant for nearly two years. Upon leaving the service of *Sir Henry Crewe*, he followed the occupation of mole-catching in the parish of *Crayford*, by which he obtained his own living. He never resided with his father's family, nor did his father exercise any control over him. In the latter end of the year 1815, when the pauper was about 17, his father left *Crayford*, and went to live first at *Poplar*, in a tenement at 4*s.* per week, where he continued about eight months, and in or about the month of *February*, 1817, went to *Bow*, where he rented a house and orchard at 20*L* per annum, and in which he

During the minority of a child, there can be no emancipation unless he marries, and so becomes himself the head of a family, or contract some other relation, so as wholly and permanently to exclude the parental control. Semble, that the acquiring a settlement of his own does not properly constitute an emancipation.

CASES IN HILARY TERM.

1822.

The KING
against
The Inhabit-
ants of
WILMINGTON.

still continues to reside. Whilst the pauper followed the business of mole-catching at *Crayford*, he used occasionally to visit his father both at *Poplar* and at *Bow*, and once slept at the father's house in *Poplar*, but he did not receive any maintenance or assistance whatsoever from his father. After the father had occupied the house at *Bow* for rather more than a year, the pauper, who was then about 19 years of age, married his present wife. The question for the opinion of the Court was, whether the pauper before his marriage was emancipated by his earning his own livelihood, in the manner before mentioned, in the parish of *Crayford*.

Bolland, in support of the order of sessions, contended, that the pauper was emancipated at the time when the father gained his settlement at *Bow*. And he relied on the case of *Eastwoodhey v. Westwoodhey* (a), and Lord *Kenyon*'s judgment in *Rex v. Offchurch* (b), and *Rex v. Walpole St. Peter's*. (c)

Berens contra, was stopped by the Court.

ABBOTT C. J. It is of importance to lay down so general rule for the guidance of magistrates on this subject of emancipation, and the best which I can suggest is this, that during the minority of a child there can be no emancipation, unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as wholly and permanently to exclude the parental control. I say nothing about his acquiring a settlement of his own, because that does not, as it seems

(a) 1 *Sgt. 432.*(b) 3 *T. R. 114.*(c) *Burr. S. C. 638.*

to int^e, properly fall under this Head. There can be, however, no question, that in that case he is only removable to his own acquired settlement. Here, the party was under 21, and had neither married nor contracted any such relation as I have described, at the time when his father acquired the settlement at Bow. He was therefore not emancipated, and the order of sessions is wrong.

1822,

The King
against
The Inhabit-
ants of
WILMINGTON.

Order of sessions quashed. (a)

(a) See *Rex v. Wilson cum Twambrookes*, 3 T. R. 555.

The KING against RIDGWAY:

Monday,
February 11th.

THIS was an appeal to the quarter sessions of the peace for the county of Lancaster, against the following conviction, for an offence under the statute 39 and 40 G. 3. c. 106. s. 4. Lancaster, to wit. Be it remembered, that on the 19th day of March, 1821, T. H., &c. are convicted before us, R. P. and S. W., Esquires, two of his majesty's justices of the peace for the county of Lancaster, of having, on the 10th of March, in the year aforesaid, and within the space of three calendar months next before this present 19th day of March, in the year aforesaid, at Great Bolton, in the county of Lancaster, attended a meeting of journeymen and workmen, then and there had and held, for the purpose of maintaining, supporting, continuing, and carrying on a combination, for a purpose, by the

Where the sessions, without hearing the merits, quashed a conviction under 39 & 40 G. 3. c. 106. s. 4. for a defect in form, the court of King's Bench will, upon a removal of the order by certiorari, quash the order of sessions, if they are of opinion that there is no defect in form, and send the case back to be heard upon the merits. It was stated in such conviction that defendants had attended a meeting for carrying on a

combination of journeymen, for the purpose of obtaining an advance of wages: Held, that this expression was synonymous with the words of the act, which prohibits combinations to obtain an advance of wages, and that the conviction was sufficient.

1822.

The KING
against
Ridgeway.

tute in such case made and provided, and hereinafter next mentioned, declared to be illegal, to wit, A combination of journeymen and workmen in the business of bleaching, for the purpose of obtaining an advance of wages in that business, contrary to the statute made in the 39th and 40th years of the reign of his late majesty, *King George* the Third, intituled, &c. When the appeal came on to be heard, several objections were taken by the counsel for the appellants to the form of the conviction. And the Sessions, without hearing any evidence on the merits, made an order for quashing the conviction, subject to the opinion of this Court as to its sufficiency in point of form.

J. Williams and *Denman*, in support of the order of sessions. Even supposing the sessions wrong, there is no precedent which can be found, where this Court have ever interfered after the sessions have quashed a conviction. This is like moving for a new trial after an acquittal for a misdemeanour, owing to a misdirection on the part of the Judge, which is never allowed. The cases in which this has been done before, are *Rex v. Allen* (a), *Rex v. Cook* (b), and *Rex v. Redfearne*. (c) But all those cases were reserved on facts, and in the two latter, the convictions had been affirmed by the sessions. Here too the act on which this conviction proceeds, has fixed a limited time within which the charge must be preferred, which affords an additional argument against reserving a case on a mere point of form, and after long delay in the court above, again trying the merits at the sessions. But supposing this not to be

(a) 15 East, 345.

(b) 3 T.R. 519.

(c) 4 T.R. 273.

well

well founded as a preliminary objection, then the conviction is defective in form. It only states, that the parties convicted, attended a meeting for the purpose of maintaining, supporting, continuing, and carrying on a combination for a purpose by the statute declared to be illegal, viz. a combination for the purpose of obtaining an advance of wages. Now this does not follow the words of the act 39 and 40 G. 3. c. 106., the third section of which, in describing the combinations thereby made illegal, calls them combinations to obtain an advance of wages. Now, a combination for the purpose of obtaining, is not necessarily a combination to obtain. For the former would include combinations for an idle, foolish, and irrelevant purpose, but the latter could only mean such as are likely or calculated to obtain the end. And this was the opinion of Lord *Ellenborough* in *Rex v. Nield and Others* (a), where he says, "It is not enough that the agreement should be for the purpose of controlling, that is, with intent to control, but it must be entered into for controlling, that is, for effecting that object." That is precisely in point with the present case. The safest way in these cases is, to follow exactly the words of the statute.

Scarlett, Coltman, and Starkie, contra, were stopped by the Court.

ABBOTT C. J. I am of opinion, that in this case, the order of sessions is wrong and must be quashed. This order is brought before us by certiorari, and that being so, we find that the original conviction has been quashed.

(a) 6 *East.* 426.

1822.

The King
against
RIDGEWAY.

1829.

THE KING
against
BROWNE,

by the sessions for informality. It is then our duty to examine it, and if we cannot see any informality in it, to quash the order of sessions. But in so doing, we ought not to deprive the party of his appeal on the merits, and therefore, we shall, after quashing the order of sessions, send the case back to them to enter continuances and hear the appeal. Then is there any informality? No man entertains greater respect for the opinion of Lord Ellenborough than I do, but I own that the observation quoted from *Rex v. Nield and Others* is not satisfactory to my mind. He seems to have considered the word purpose as synonymous with the word intent, and to have thought that an agreement with intent to control might not be an agreement to control. But looking at this act of parliament, I am of opinion, that a combination for the purpose of obtaining, and a combination to obtain an advance of wages, are the same. The third section expressly prohibits combinations to obtain an advance of wages, or to lessen the time of work, or to decrease the quantity, or for any other purpose contrary to the act. That shews, that the legislature in using the word "purpose" in this act, meant it to be synonymous not with "intent," but with "object." The same observation is deducible from the words of the fourth section. I think, therefore, that there is no difference in the sense of the words used in this conviction, and the words of the act of parliament, and if so, the conviction is sufficient.

BAYLEY J. I am of the same opinion. The very words of the statute need not be used in the conviction, it is sufficient if the words used are equivalent with the words of the act. Now, here the words "for the purpose"

pose of obtaining," and "to obtain," are, looking at this act of parliament, clearly synonymous. As to the other question, I entertain no doubt. The sessions have quashed the conviction for want of form, and upon its being brought before us, no want of form appears. Their order is therefore wrong, but I agree that the case should be remitted to them, that they may now hear it on the merits.

1822.

The King
against
Bridgwater.

BEST J. (a) concurred.

Order of sessions quashed, and case sent back to the sessions to enter continuances and hear the appeal on the merits.

(a) Holroyd J. had left the court.

The KING against the Mayor, &c. of GREAT Monday,
February 11th
YARMOUTH.

PLOSSETT Serjt. had obtained a rule to shew cause why the Master of the Crown Office should not again examine the matter, and tax the defendants their costs in this case, which was a traverse to a return to a writ of mandamus, commanding the defendants to admit the prosecutor to his freedom. It appeared that *William Barth*, one of the common councilmen of the borough, was a material witness on behalf of the prosecutor, and subpoenaed to attend the trial at the last assizes for Norfolk. In consequence of his absence, the prosecutor will be compelled to pay the costs of not proceeding to trial pursuant to notice.

Where, in a case in which a corporation were defendants, the record is withdrawn in consequence of the absence of a material witness, who is one of the corporation, and it does not appear that such absence arises from the act of, or is in collusion with the other corporations, the prosecutor will be compelled to pay the costs of not proceeding to trial pursuant to notice.

1882.

The King
against
The Mayor, &c.
of Great
Yarmouth.

record was withdrawn. The Master of the Crown Office certified, that upon reading the affidavits produced before him on both sides, he was of opinion that costs ought not to be paid by the prosecutor for not proceeding to trial in this case, it appearing, that the not proceeding to trial was occasioned by the absence of one of the witnesses subpoenaed by the prosecutor, which witness was a member of the corporation, and for whose absence there was not any sufficient excuse. It was contended, in support of the rule, that the Master had proceeded upon a wrong principle, inasmuch as the mere circumstance of the witness being a member of the corporation, and being absent without sufficient reason, was not sufficient, unless it appeared also, that in absenting himself, he had acted in collusion with the defendants.

The Court, after hearing *Storks*, who shewed cause, and *Blossett Serjt.*, and *E. Alderson*, in support of the rule, directed that the case should go back to the Master to examine the affidavits again as to the point, whether the absence of the witness was produced by the act of, or in collusion with the other corporators; directing him to award costs, in case he was of opinion that the witness's absence, although without sufficient excuse, arose entirely from his own act.

Rule absolute.

(a) Alderson v. Mayor, &c., of Great Yarmouth, 1882, 1 Q. B. 2d, 582.

BLUNDELL against BLUNDELL.

1828

See 3d

Monda

FEB 1828

ATTORNEY

Where an attorney, knowing that bail are insufficient, puts them in, and gives notice of justification, he will be personally liable to pay the costs of the opposition.

ANDREWS had obtained a rule to shew cause why the defendant's attorney should not pay to the plaintiff's attorney the costs of the oppositions to bail in this case. It appeared, that on the 17th December last, notice was given in the name of the defendant's attorney, that two persons of the name of *Miles* and *Hutchings* would justify as bail on the 20th December. At the time when the notice was served, the managing clerk of the defendant's attorney assured the plaintiff's attorney that the bail were both respectable persons, and requested that he would consent to their justification. It turned out, however, upon enquiry, that *Hutchings* was an insolvent, and upon this being discovered, the bail did not justify. On the 22d December, application was made to add another person as bail, and on the 27th, notice of justification was given for *Miles*, and one *Thomas Moody*, whose residence was described, No. 5, Waterloo Road, Southwark. On the 31st December the parties attended at Mr. J. Holroyd's chambers, but *Moody* did not attend. On the 1st January another notice of justification was given for the 2d, and on the 2d January, it appearing that *Moody*'s residence had been misdescribed, being No. 50, Waterloo Road, Southwark, the bail did not justify. Another notice was given for the 4th January, when, upon attending at the Judge's chambers, *Miles* was rejected as being insufficient. In support of his rule, he cited *Steer v. Smith.* (a)

CASES IN HILARY TERM

1828.

BLUNDELL
against
BLUNDELL:

Turton shewed cause, upon an affidavit, which stated, that the representation made as to the respectability of the original bail was made by the managing clerk, without the knowledge, privity, or consent of the defendant's attorney, and that the mistake as to *Moody*'s residence was a mere clerical error: and he contended, that there was no reason to make the defendant's attorney pay the costs in this case, it not appearing that he had acted vexatiously in the transaction.

Andrews, in support of his rule, was stopped by the Court.

ABBOTT C. J. Here there clearly was a misrepresentation as to the respectability of the original bail, by the managing clerk of the defendant's attorney. It is indeed now said, that all this was without the privity or knowledge of the latter, but he does not swear, that, at the time when the bail were put in, he was ignorant of their insufficiency. It was his duty to take care not to put them in as bail, if he knew them to be unfit to justify; and it will be a wholesome lesson to others to make the defendant's attorney, in this case, pay the costs.

Rule absolute, with costs.

1822.

The KING against the Justices of COLCHESTER.

Monday,
February 11th.

JESSOPP, in last *Michaelmas* term, had obtained a rule nisi for a mandamus to the justices of *Colchester*, to enter continuances, and hear an appeal against the overseers' accounts of the parish of *St. Botolph*, in the borough of *Colchester*. The accounts in question had, on the 14th *May* last, been duly allowed by two justices, pursuant to 17 G. 2. c. 38., at a petty sessions; but they had not been examined and allowed at a special sessions, pursuant to 50 G. 3. c. 49. The sessions dismissed the appeal, on the ground that they had no jurisdiction.

It is not necessary in order to give the justices at sessions jurisdiction to hear an appeal against overseers' accounts, that such accounts should previously have been examined and allowed, pursuant to 50 G. 3. c. 49.

Knox and *Walford* shewed cause. The sessions, in this case, had no jurisdiction. In *Rex v. Bartlett* (*a*), it was held (before 17 G. 2. c. 38.) that the sessions had no jurisdiction until the accounts had been allowed, pursuant to 43 Eliz.; and in *Rex v. Whitear* (*b*), which occurred after 17 G. 2., the same law was laid down. Now, by the 50 G. 3. c. 49., certain other provisions were made to the mode of allowing overseers' accounts, which, in *Lester's* case (*c*), were held to be cumulative. Then if so, by parity of reasoning to the cases above cited, these provisions should be complied with before any appeal can be made.

Per Curiam. We are quite satisfied that the sessions

(*a*) *Str. 983.*

(*b*) *3 Burr. 1365.*

(*c*) *16 H. 374.*

had

CASES IN HILARY TERM

1822. had jurisdiction, and that they ought to have heard the appeal. This rule must be absolute.

The King
against
The Justices of
COLCHESTER.

Rule absolute.

Jessopp and Brodrick were to have supported the rule.

Tuesday,
February 12th.

FOXALL against BANKS and Another.

A certificate to
deprive a plain-
tiff of costs
may be endorsed
on the postea
after costs have
been taxed,
and although
the defendants'
attorney was
present and did
not object to
such taxation.

HUTCHINSON, on a prior day in this term, obtained a rule nisi, calling on the plaintiff's attorney to produce the postea in this case, before *Wood B.*, in order that he might certify, to deprive the plaintiff of his costs. The case, which was an action of trespass, was tried at the last assizes for *Surry*, before *Wood B.*, when a verdict was found for the plaintiff, damages one farthing. The Judge, at the trial, intimated his intention of considering whether he should certify or not. It appeared by the affidavit, that the costs had been regularly taxed, and that the taxation had been attended by the clerk of the defendants' attorney, and that no objection was then made. Subsequently to this, a summons was taken out before *Wood B.*, to shew cause why the postea should not be produced, and a certificate endorsed thereon. This summons was attended by the parties, and the learned Judge then expressed his intention to certify, but the plaintiff's attorney refused to produce the postea for that purpose.

Turton shewed cause, and contended, that the application for a certificate came too late, after the costs had been taxed.

Per

Per Curiam. The application was in time, for a certificate may at any time be indorsed on the postea. Let the rule be made absolute, and with costs.

1822.

 FOXALL
against
BANKS.

Rule absolute, with costs.

CHAPPELL against ASHLEY.

Tuesday,
February 12th.

ANDREWS moved for a rule nisi to discharge a rule granted on a former day in this term for compelling the defendant (under the compulsory clause in the Lords' act), to give an account of his estate and effects pursuant to that statute. It appeared that the debt due to the plaintiff amounted to 112*l.*, but that the whole amount of the debts with which he was charged in execution exceeded 300*l.* It was contended that the second and third clauses of the 33 G. 3. c. 5. must be construed together, and that, inasmuch as the defendant could not be entitled to the relief given by the second clause, he ought not to be subjected to the compulsory power in the third.

When a defendant is in execution for a particular debt under 300*l.*, although the aggregate of the debts for which he is in execution exceeds that sum, he is liable, at the instance of the particular creditor, to be brought up under the compulsory clause in the lords' act, 33 G. 3. c. 5.

ABBOTT C. J. I am of opinion that the defendant is not entitled to this rule. The act of parliament is a remedial one for the benefit of the creditor; and I think that it is competent for any one creditor whose debt does not amount to 300*l.* to avail himself of this clause in the act, and to compel the defendant to assign his property, whatever may be the whole amount of the debts for which the defendant is in execution.

Rule refused.

1822.

Tuesday,
February 12th.

In the Matter of TAYLOR, Gent. one, &c.

A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown : Held, that he could not, within 22 G. 2. c. 46. s. 8 & 10., be considered as serving his whole time and term in the proper business of an attorney, and that he ought not to be admitted on the roll, and that having been admitted, he ought to be struck off.

E. ALDERSON, in last *Michaelmas* term, obtained a rule nisi for striking this person off the roll of attorneys of this court, upon the ground that he had not duly served his time as a clerk to an attorney. It appeared upon the affidavits, that during the whole time for which he was bound, he had been surveyor of taxes for the wapentake of *Claro*, and the borough and liberty of *Ripon*, in the county of *York*; for which purpose he occupied an office, where the business relating to the taxes was conducted. The affidavits in answer admitted this fact, but stated that the business of the office did not occupy more than one-eighth of his time, and that during all the remaining portion, he was employed in learning his profession as an attorney.

Scarlett and *Littledale* shewed cause, and contended that this was no more than if the time employed by him as surveyor of taxes had been allowed to him by the consent of his master for the acquisition of any other useful information, or for amusement; and that substantially he had served the full time required by law.

E. Alderson contra referred to 22 G. 2. c. 46. s. 8., by which every person who shall be bound to serve any attorney shall, during the whole time and term of service, continue and be actually employed by such attorney in the proper business, practice, or employment of an attorney; and by section 10., before he can be admitted,

he

he must make an affidavit that he has actually and really served during the said whole term of five years. Here there were two inconsistent employments, and, therefore, he could not possibly have served the whole time and term.

1822.

In the Matter of
TAYLOR.

Per Curiam. It is very important that we should require these provisions to be strictly complied with. Here the party having an employment under the crown during the whole time, could not, with propriety, have made the requisite affidavit. And, therefore, however much we may regret it, we think it our duty to make this rule absolute.

Rule absolute.

REX against the Justices of SURREY.

Tuesday,
February 12th.

COWLEY had obtained a rule nisi for a mandamus to the justices of *Surrey* to enter continuances, and hear the appeal of *Andrew Barnet* against a conviction for gaming under 12 G. 2. c. 28. The defendant was convicted on the 6th November last, and entered into recognizances to appeal against it to the next quarter sessions. It was sworn on the one side, and denied by the other, that at the time of entering into recognizances, his attorney gave a verbal notice to the informer of his intention to appeal. The defendant attended in order to prosecute his appeal at the last *January* sessions, when, there having been no notice of appeal in writing, the Court refused to hear the appeal. The 5th section of the act giving the appeal

Where a statute gives an appeal, the appellant giving reasonable notice to the other parties; such notice need not be in writing, but a verbal notice, if reasonable as to time, is sufficient.

1822.

The KING
against
The Justices of
SURREY.

peal states, that "persons aggrieved may appeal, giving reasonable notice to the prosecutor, and entering into recognizances, &c."

Turton shewed cause, and contended that the sessions were to judge what was a reasonable notice of appeal, and they were of opinion that it must be a notice in writing.

Cowley and *Adolphus contra*, stopped by the Court.

ABBOTT C. J. We are of opinion, that where a statute requires reasonable notice to be given, it does not necessarily mean that the notice should be in writing, but only that as to time or number of days it should be reasonable. Here, however, as the fact is disputed, we shall only grant a mandamus to the justices, commanding them to examine whether reasonable verbal notice has been given, and, in that case, to enter continuances, and hear the appeal.

Rule accordingly.

Tuesday,
February 19th.

JOHNSON against BIRLEY and Others.

In trespass the
Court will,
upon a proper
case being made
for it, require
the plaintiff's
attorney to give
to the defendants
information.

LITTLEDALE, on a former day in this term, obtained a rule nisi, calling on the plaintiff's attorney to disclose the place of residence and occupation of the plaintiff to the defendants, and for staying the proceedings

as to the place of abode and occupation of the plaintiff. And where the alleged assault was stated to have taken place, at a meeting at which many thousand people were present, and the defendants did not know, and could not find out, after diligent enquiry, who the plaintiff was, the Court thought it a proper case for their requiring such information to be given.

ceedings

ceedings in the mean time. It was an action of trespass and assault brought against the *Manchester Yeomanry* for their conduct on the 16th *August*, 1819. To this the defendants pleaded several justifications, besides the general issue. The affidavits stated that the defendants and their attorneys had made minute and particular enquiries in *Manchester* and its neighbourhood to discover who the plaintiff was, without success, and that they had applied for the requisite information to the plaintiff's attorney, who had refused to give it. The meeting at which the assault, if any, took place was attended by many thousand individuals.

1822.

Johnson
against
Birley.

Evans and *Bingham* shewed cause. This is a novel application. The only instances in which it has been granted have been in *qui tam* actions, and in *ejectment*. *Tidd. Pr. 554.* and *Crompton's Pr. 473.* state this hitherto to have been the rule of the Court; and in *Braceby v. Dalton* (*a*), the Court expressly so laid it down. As to *Gynn v. Kirby* (*b*), it probably was a *qui tam* action, although that does not distinctly so appear; and so must have been *Anonymous*. (*c*) As to *Taylor v. Harris* (*d*), that was the case of a plea in abatement, and does not bear upon this question. Here the existence of the plaintiff is admitted by the plea, and if the object be as to costs, it is now too late to apply for security for costs. The plaintiff may have good reasons for not wishing to disclose his occupation and place of abode, the defendants being powerful, and irritated against him.

(*a*) *2 Str. 705.*(*b*) *1 Str. 401.*(*c*) *2 Barnardiston, 2.*(*d*) *4 B. & A. 93.*

CASES IN HILARY TERM

1822.

 JOHNSON
 against
 BAYLEY.

Scarlett, Hullock Serjt., Littledale, and Starkie, in support of the rule, were stopped by the Court.

ABBOTT C. J. It does not clearly appear to me that the case of *Gynne v. Kirby* was a *qui tam* action; for in *Braceby v. Dalton*, the editor has suggested in a note, *quere contrá*, 1 *Str.* 401.; so that it is at least doubtful. But, independently of any authority, I am satisfied that the due administration of justice requires that this rule should be made absolute. If it should be followed up by any application for security for costs, that will probably be without success. But there is no reason why the plaintiff should not give this information to the defendants. Unless they have it, they will be under great difficulty in preparing their defence. This alleged assault took place at a meeting of many thousand persons, and the defendants may therefore very probably be altogether ignorant of the plaintiff or his person. The rule generally has been confined to actions of ejectment and *qui tam*, because it is only in such cases that it ordinarily happens that a defendant is totally ignorant of the plaintiff. It is our duty, however, in all cases to do equal justice, and that requires that this rule should be made absolute.

BAYLEY J. I am of the same opinion. There is a positive affidavit that the defendants cannot, after diligent search, find out who the plaintiff is, and I think they ought to know that fact; for if they do not, it may be a great obstruction to justice. Previously to the statute of *Westminster*, a plaintiff appeared in person, unless he had a special writ authorising him to appear by attorney. Then the pleadings were *ore tenus*, and a defendant

defendant had the privilege of seeing and knowing who the plaintiff was. In cases of *qui tam* actions and ejectment, rules of this sort have been before granted, because, in those cases, it not unfrequently happens that a defendant does not know who the plaintiff is. It must not be supposed that the authority of *Braceby v. Dalton* is now unquestioned. Independently of the note to which my Lord C. J. has referred, the practice of the courts has since been materially altered. At that period the courts invariably refused to require security for costs to be given. The practice now, as to that, is settled to be the other way. I have no doubt, that, in the sound exercise of the discretion vested in us, we ought to grant this rule. Here, many thousands were present at the meeting at which the alleged assault took place; and it may make all the difference to the defence to know who the plaintiff is, and thus to ascertain in what part of the crowd he stood. The justification might be very different, whether the plaintiff was actively employed, or only a spectator of the tumult. It is requisite, in order that both parties may have a fair trial, that the information required by this rule should be given.

1822.

 JOHNSON
 against
 BIRLEY.

HOLROYD and BEST Js. concurred.

Rule absolute. (a)

(a) In *Worton and Others v. Smith and another*, *T. 1821*, the court of Common Pleas granted a similar application in an action on the case for a libel. *Ex relatione Hullock Serjt.*

1822.

DOE on the Demise of JOHN HURRELL LUSCOMBE against YATES, HAWKER, and MUDGE.

Devised of a mansion-house and lands to trustees upon trust until John Luscombe Manning should attain the age of 21 years, and then to him for life, he taking and using the testator's surname of Luscombe instead of his own surname, with limitations over to his first and other sons in strict settle-

ment, they severally taking and using the testator's surname instead of their own. There were other limitations over to other persons. The will then contained a proviso, that when any of the premises thereby devised should vest in any person not bearing the surname of Luscombe, that person should, as soon as he should be in possession of the estate, take upon himself the name of Luscombe, and use the same as for and instead of his own surname, and should, within three years then next after, procure his own name to be altered to the testator's surname of Luscombe by act of parliament, or some other effectual way for that purpose, and in case any of the persons to whom the estate was limited, and who should be in possession of the same, should not take and use the testator's surname, but should neglect to get an act of parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after he should be in possession, that then the estate devised for the benefit of such person so neglecting to get such act of parliament, or other authority, should cease, and become void, as if no such use or estate had been thereby devised; and the same should immediately, upon the expiration of the three years, go over to and vest in the person next in remainder or reversion, in the same manner as if such person so neglecting to change his surname was dead without issue, upon this express condition, that such person so to take did and should also take the testator's surname, and get an act of parliament, or some other authority as effectual for that purpose, otherwise the estate was to go over again. *J. L. Manning*, before he came of age, or entered into possession of the premises demised, took upon himself, used, and bore the surname of Luscombe and no other. But no act of parliament had ever been obtained authorising him to change his name, nor was the king's licence for that purpose obtained within three years after he so entered into possession: Held, that inasmuch as he bore the surname of Luscombe at the time when the estate came to him, he had substantially complied with the directions of the testator, and that he did not incur a forfeiture of that estate by not obtaining an act of parliament, or other authority, the proviso only applying to persons not bearing the surname of Luscombe at the time when the estate vested in them.

Combe

Combe Royal, and other premises therein described, and the several parcels of land called *Rents*, enjoyed with the said last-mentioned tenement, with the rights, members, and appurtenances thereof, situate in *West Alvington*, and all that close or parcel of land called *Pye Park*, situate in the parish of *Dodbrook*, in the said county, with its appurtenances, and all other his freehold messuages, lands, tenements, and hereditaments whatsoever, situate in *Devon* or elsewhere, with their appurtenances: upon the trusts, and to and for the several uses, and under and subject to the powers, limitations, and provisoies thereinafter expressed of and concerning the same, that is to say, as for and concerning the capital mansion of the barton of *Combe Royal* aforesaid: upon trust to permit and suffer his niece, *Margaret Manning*, wife of *Richard Manning*, and his niece, *Mary Creed*, her sister, and *Juliana Jutsham*, (who then lived with him at *Combe Royal*) and the survivor of them, to hold the said mansion house and premises, and to inhabit the said mansion house, and to take the rents of the other premises as a recompence for their maintenance and education of his cousin, *John Luscombe Manning*, son of the said *Margaret Manning*, who he willed should live therewith, and be well provided for and maintained by them in all respects suitable to his condition, until he should attain the age of 21 years, or die; and from and after the determination of that estate, as to the said mansion house and premises to be enjoyed therewith in trust for the maintenance and education of the said *John Luscombe Manning*, as also for and concerning all the other parts and parcels of the said barton of *Combe Royal*, and all other the messuages, lands, &c. devised to the said trustees and

1822.

Dox dem.
LUSCOMBE
against
YATES.

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1822.

*Des dem.
Luscombe
against
Taver.*

their heirs, from and immediately after the testator's decease to the use of the said trustees and their heirs in trust for his said cousin, *John Luscombe Manning*, until he should attain the age of 21 years, or die, whichever should first happen, and to the intent that the same might be set out at a yearly rent, and the profits accumulate for his benefit until he should attain that age, or die; and from and immediately after the said *John Luscombe Manning* should have attained the age of 21 years, then to the use and behoof of the said *John Luscombe Manning* and his assigns for his life, he taking and using the testator's surname of *Luscombe*, as for and instead of his own surname, and from and after the forfeiture or other determination of that life estate, to the use of the said trustees and their heirs for the life of the said *John Luscombe Manning*, upon trust to preserve the contingent remainders, and from and immediately after the decease of the said *John Luscombe Manning*, to the use of his first and other sons, and their heirs male, taking and using the surname of *Luscombe*, as for and instead of his and their own surname, and in default of such issue, to the use of the 2d, 3d, and 4th, and all and every other son and sons of the said *Margaret Manning*, by the said *Richard Manning*, her then husband, and in default of such issue, to the use and behoof of the first and other sons of *Margaret Manning*, by any after taken husband, severally taking and using the surname of *Luscombe*, as for and instead of his and their own surname, and in default of such issue, to the use and behoof of the said trustees and their heirs, for the life of *Margaret Manning* upon trust for her sole benefit, and after her decease, then to the trustees during the life of *Mary Creed*,

Creed, upon trust to pay the rents and profits to her for life, with similar limitations to her first and other sons, severally taking and using the surname of *Luscombe* instead of his and their own surname, and in default of such issue, then to the use of his cousin *J. L. Ryan* for life, he taking and using the surname of *Luscombe*, as for and instead of his own surname, with similar limitations to his first and other sons, and their heirs male severally taking and using the surname of *Luscombe*, as for his and their own surname. There then came the following proviso, "Provided always, and it is my express will, and I do hereby impower, direct, and appoint, that the heirs male of the several body and bodies of the said *Margaret Manning* and *Mary Creed*, and that the said *John Luscombe Ryan*, and the heirs male of his body, and each and every of them respectively claiming, or that shall claim under this my will, or any of the limitations therein contained, any right, estate, or title to the capital, messuage and tenement, barton lands and hereditaments, with the appurtenances therein before mentioned, called *Combe Royal*, in the parish of *West Alvington* aforesaid, or any other of the lands or hereditaments comprised in the first (a) devise of this will, not bearing the surname of *Luscombe*, shall when, and as soon as he or they, or any of them, shall be respectively in possession of the same premises, or any part thereof, under this my will, take upon him or themselves, the name of *Luscombe*, and use the same as for and instead of his and their own surname as aforesaid, and shall within three years, then next after, procure his and their

1892.

Dox dms.
Luscombe
against
Yates.

(a) The other devises are omitted, as they are immaterial as to the question decided.

1822.

—
Dox dem.
Luscombe
against
Yates.

own name or names to be altered and changed to my name of *Luscombe*, by act or acts of parliament, or some other effectual way for that purpose, and shall for ever after have use, and bear on all occasions the said surname of *Luscombe* for him and them, and the heirs male of his and their body and bodies as aforesaid, and in case any or either of the heirs male of the body of the said *Margaret Manning* or *Mary Creed*, or the said *John Luscombe Ryan*, or the heirs male of his body, or any or either of them respectively, who shall be in possession of the said capital messuage, barton lands and hereditaments, called *Combe Royal*, or other the lands and hereditaments hereby first devised, or any part thereof, by, under, or in virtue of this my will, shall not take and use my said surname, but shall neglect to get an act of parliament or some other authority as effectual for that purpose as aforesaid, for the space of three years next, after he, she, or they shall be in possession of the same as aforesaid, that then and in such case, the use and estate hereby given, devised or limited, of and in the same premises, to and for the benefit of such person or persons so neglecting to get, or not getting such act of parliament or other authority as aforesaid, shall cease and become void as if on such use or estate had been hereby given, devised, or limited, and the same premises and every part thereof shall immediately, upon and after the expiration of the said three years, go over to and descend upon, and vest in such person or persons as shall be next in remainder or reversion, or unto and upon whom the said premises are hereby settled or limited in the same manner, to all intents and purposes, as if such person or persons so neglecting to change his or their surname, or surnames,

was,

was, were, or had been dead without issue of his or their body or bodies, any thing herein contained to the contrary notwithstanding. Upon this express condition, nevertheless, that such person so to take, do and shall also take my surname, and get an act of parliament or such other effectual authority, for so doing as aforesaid, otherwise the said capital messuage and barton of *Combe Royal*: and all the other premises hereby first devised, shall go over to the next person to whom the same are limited as aforesaid, who shall so take my surname as aforesaid." On the 8th of *June*, 1776, the testator duly executed a codicil to his will, whereby he appointed his cousin, *John Luscombe*, to be a co-trustee with the three persons named in his will. Shortly after executing the codicil, viz. in *July* 1776, the testator died. *John Luscombe* was the survivor of the four trustees named in the will and codicil, and died many years since, leaving *John Hurrell Luscombe*, the lessor of the plaintiff, his eldest son and heir at law, him surviving. *Juliana Jutsham* died in *November*, 1787, and *Margaret Manning* died on the 28th *October*, 1817, leaving only one son, viz. *John Luscombe Manning*, the devisee named in the will. He was born the 28th *April*, 1773, and on his coming of age in the year 1794, he entered and took possession of the premises in question, and continued in possession thereof until the 29th of *August*, 1812, on which day he conveyed his interest to the two defendants, *Yates* and *Hawker*, for the benefit of his creditors. The other defendant, *Mudge*, was tenant in possession under *Yates* and *Hawker*. *John Luscombe Manning*, the devisee, named in the will, before he became of age, or was let into possession of the premises in question, took upon

himself

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*Dox den.
Luscombe
against
Yates.*

1822.

Dox dem.
Luscombe
against
Yates.

himself used and bore the surname of *Luscombe*, and from thenceforth had borne and used, and still did bear and use the surname of *Luscombe*, and no other. But no act of parliament had ever been obtained by the said *John Luscombe Manning*, the devisee named in the will, authorising him so to change his name, nor did he procure his majesty's royal licence for that purpose until *June 1813*. *John Luscombe Manning*, the devisee named in the will, had been married some years, and had a son born on or about the month of *October 1806*, who was still living. *Mary Creed*, another of the devisees, intermarried many years ago with *Richard Hawkins*, and was still living. The declaration in ejectment was served in 1819.

This case was argued at the sittings before *Michaelmas term*, by *Sugden* for the lessor of the plaintiff, and *Preston* for the defendant; and the following questions were made:

First, whether the directions of the testator as to the surname of *Luscombe* had, as far as respected the devisee, *John Luscombe Manning*, been complied with by him. Secondly, whether in the event of those directions not having been complied with by him, the estate limited to him had thereby become forfeited. Thirdly, whether the estate limited to his first son had thereby become forfeited. Fourthly, whether the surviving trustee was, by the adverse possession of *John Luscombe Manning*, and the defendants as claiming under him, ever since the year 1794, when *John Luscombe Manning* became of age and entered into possession of the premises, barred from recovering them by virtue of the statute of limitations: and if not, Fifthly, whether the surviving trustee was entitled to recover for the benefit of *Mary Hawkins*, formerly *Creed*. It is unnecessary to report the

the arguments on these several points, inasmuch as the Court only pronounced judgment upon one. The arguments on that point, were in substance as follows: For the plaintiff, it was contended, that the estate of *John Luscombe Manning* had been forfeited, in consequence of his not having complied with the terms of the proviso, by which it was required, "that any party to whom the estate shall come, shall, within three years next after, get and procure his name to be altered and changed to the name of *Luscombe* by act of parliament, or some other effectual way for that purpose." The terms of the proviso are not satisfied by the party's having assumed the name before the estate vested in him. In *Leigh v. Leigh* (a), Lord Eldon says, "An act of parliament giving a new name does not take away the former name; a legacy given by that name might be taken. In most of the acts of parliament for this purpose, there is a special proviso to prevent the loss of the former name. The king's licence is nothing more than permission to take the name, and does not give it; a name, therefore, taken in that way is by voluntary assumption." The intention of the testator in this case was, that any person taking the estate under his will, and not having his name by descent, should be compelled to take it by act of parliament, and should retain no other surname. If the party taking the estate has the name by descent, he can have no other surname; and there could be no reason, therefore, for altering it; but if he merely assumes the surname, he does not thereby lose the former surname, and, consequently, the name assumed is not his only surname, as required by the proviso. The only effectual mode of getting rid of the first surname is by an act of parliament.

1822.

*Don dom.
Luscombe
against
Yates.*

1822.

Dor. dem.
Luscombe
against
Yates.

For the defendants it was contended, that the proposito only applied to a person who did not actually bear the surname of *Luscombe* at the time when the estate came to him. In this case, *J. L. Manning* had taken upon himself and bore the name of *Luscombe* long before the estate vested in him. It is true that he had acquired that surname by assumption. It is shewn, however, in *Camden's Remains concerning Britain*, that surnames were originally acquired by that mode; and in p. 141. (a) that learned author gives an instance where six of the grandchildren and four great-grandchildren, descended from *William Belward*, by two sons, all acquired different surnames by assumption. The opinion of Lord *Eldon*, in the passage cited from *Leigh v. Leigh*, and that of Sir *Joseph Jekyll*, in *Barlow v. Bateman* (a), are authorities to the same effect. Now it never could have been intended by the

(a) But for variety and alteration of names in one familie upon divers respects, I will give you one *Cheshire* example for all, out of an ancient rolle belonging to Sir *William Brereton*, of *Brereton*, knight, which I saw twenty years since. Not long after the conquest *William Belward*, lord of the motie of *Malpas*, had two sons, *Dan-David* of *Malpas*, surnamed *Le Clerke*, and *Richard*; *Dan David* had *William*, his eldest son, surnamed *De Mal-passe*; his second son was named *Philip Gogh*, one of the issue of whose eldest sons took the name of *Egerton*; a third son took the name of *David Golborne*, and one of his sons the name of *Goodman*. *Richard*, the other son of the aforesaid *William Belward*, had three sons, who took also divers names, viz. *Tho. de Colgrave*, *Willil de Overton*, and *Richard Little*, who had two sons, the one named *Ken-clarke*, and the other *John Richardson*. Herein you may note alteration of names in respect of habitation in *Egerton*, *Colgrave*, *Overton*; in respect of colour in *Gogh*, that is, red; in respect of qualitie in him that was called *Goodman*; in respect of stature in *Richard Little*; in respect of learning in *Ken-clarke*; in respect of the father's Christian name in *Richardson*; all descending from *William Belward*. And verily the gentlemen of those so different names in *Cheshire* would not easily be induced to believe they were descended from one house, if it were not warranted by so ancient a proof." *Camden's Remains concerning Britain*, ed. 1687. p. 141.

(b) *8 Pears*, Will. 64.

testator,

testator, that he who was legally entitled to bear his name at the time when the estate descended to him, should obtain an act of parliament for the purpose of changing his name; for suppose that *J. L. Manning*, having taken the surname of *Luscombe*, married and had children, and then died, it might as well be contended, in that case, that when the estate descended upon any of those children, that they who never had any other surname would be bound to obtain an act of parliament, making it imperative upon them to keep the surname of *Luscombe*. But the proviso does not absolutely require that there should be an act of parliament, but that it should be done by that means, or some other authority as effectual for that purpose. Now the assumption of the testator's surname is a mode equally effectual of acquiring the new surname as an act of parliament.

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Dor dem.
LUSCOMBE
against
YATES.

Cur. adv. vult.

And now the judgment of the Court was delivered by

ABBOTT C. J. This case was argued in October last, before my Brothers *Holroyd* and *Best* and me. Several points were urged in argument at the bar, but, as our judgment proceeds upon one only, it is not necessary to advert to the others. It appears, by the case, that *John Luscombe Manning* took no estate in the lands devised until he came of age; and it is found, that before he came of age, and before he was let into possession, he took upon himself the surname of *Luscombe*, and has ever since borne and used the surname of *Luscombe*, and no other; so that he has undoubtedly, in this respect, complied with the words of the direction contained in the clause whereby the lands are given to him, and has in substance

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*Deo dem.
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substance complied with the desire and intention of the testator, which was, that the person who enjoyed his lands should bear his name. But it is said that he did not comply with the terms of the proviso, because, although he had taken and used the surname of *Lasson* before he came to the estate, yet he did not, within three years after he took possession of the estate, take that name by virtue of an act of parliament, or other authority for that purpose, and that therefore the estate was, by that omission, for ever gone from him, and not from him alone, but also from his son, who would, upon the death of his father, have taken an estate tail under the will, if his father had, within three years, obtained an act of parliament, or other sufficient authority, but before we pronounce a judgment to this effect, under the circumstances that I have mentioned, it behoves us, in a case wherein the general intent of the testator, directing the course in which his land should be enjoyed, has been, as I have before observed, substantially complied with in regard to the name, to look carefully into the words of the proviso, and see who and what description of persons are contained within it. And we are to consider, that this is a proviso introduced to defeat an estate, already vested, for the breach of a condition subsequent, and is in the nature of a forfeiture, and consequently that the words of it must, according to general rules and principles, be construed strictly, and effect must not be given to it, unless the supposed intention of the testator be expressed in plain and unambiguous language. The proviso consists of two parts. The description in the first part is, "the heirs male of the several bodies of *Margaret Manning*, and of *Mary Creed*, and *John L. Ryan*, and the heirs male of his body not bearing the surname

of

of *Luscombe*." These are the persons required to take that surname. In the second part of the proviso, and which contains the devise over, the words "*not bearing the surname of Luscombe*," do not again occur; but this second part must be taken with reference to the first; and in this part other words of the same import do occur, for the lands are to vest in the person who would be next entitled to take, if the person so neglecting to change his surname was or had been dead without issue of his body. This then introduces the question, what sense and meaning ought, in the legal construction of this proviso, to be put upon the words "*not bearing the surname of Luscombe*:" whether a bearing of that name *de facto* be sufficient, or whether it is requisite that it should be borne by authority of an act of parliament, or other special authority? If the testator had clearly intended the bearing of this name by virtue of some particular authority, it would have been very easy to have expressed that intention. He might have said, "*not bearing the name by virtue of an act of parliament, or some other authority as effectual*;" according to the expressions used in another part of the proviso: or he might in some way have referred to that part of the proviso, as by saying, "*not bearing the name as hereinafter mentioned*," or something to that effect. Whereas nothing of this kind occurs in this part of the will, but the words are general and simple, "*not bearing the surname of Luscombe*;" so that if any qualification is to be introduced, it can only be done by the addition of some other words, and such addition must be made by implication or intendment. But we think we ought not to make this addition for two reasons; first, because the effect of this clause, as before observed,

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served, is to defeat and divest an estate actually vested; and, secondly, because such an implication or intend-
ment is not necessary to effect the general object and intention of the testator. For a name assumed by the voluntary act of a young man at his outset into life, adopted by all who know him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually *his* name as if he had obtained an act of parliament to confer it upon him. We would not be understood to say that where a testator expressly requires a name to be taken by act of parliament, or other specified mode, any mode falling short of the specified mode may be substituted for it; or to say, that under this particular will a voluntary assumption of the name after the party became possessed of the estate, would be sufficient. All we mean is this, that as the testator has annexed no express qualification to the words, *bearing the surname of Luscombe*, and the word surname is not used in this will to denote a name inherited from the father, and as a bearing de facto, answers every useful purpose that could be obtained under the authority of an act of parliament, a bearing de facto, though by voluntary assumption, is sufficient to satisfy the general and ordinary meaning of the words "bearing the surname;" and we cannot say with certainty that the testator intended any thing more, or meant to use the words in that qualified and restrained sense which must be given to them in order to pronounce that the condition has been broken, and that the estate shall pass over to another claimant. For these reasons we, who heard the argument, are of opinion that a nonsuit should be entered.

Judgment of nonsuit.

1822.

HANSON and Another against ARMITAGE.

ASSUMPSIT for the price of two chests of tea. Plea, general issue. At the trial before Abbott C. J. at the *Middlesex* sittings after *Hilary* term, 1821, the following appeared to be the facts of the case: The plaintiffs, who were wholesale tea-dealers in *London*, had been in the habit of shipping teas to the defendant, who was a grocer, resident at *Barnsley* in *Yorkshire*. The usual course was to deliver the tea at the wharf of one *Staunton* in *London*, to be forwarded by the first ship; and several parcels of tea, sent in this manner, had been paid for by the defendant. On the 3d *June*, 1820, the plaintiffs delivered at *Staunton's* wharf two chests of tea, to be forwarded to the defendant in the usual manner. The vessel in which this tea was shipped was lost on her voyage. The plaintiffs, on the 10th of *June*, transmitted by post to the defendant an invoice of the tea, and on the 13th, the defendant returned the same by post, and stated "that he had nothing to do with it, as he had heard of the loss of the ship before the invoice arrived, and that he would not take to the account." There was no other evidence of any order having been given to the plaintiffs for the tea in question: upon these facts the Lord Chief Justice directed the jury that they might fairly presume that the defendant had given a parol order for the tea, and stated that he would reserve the question for the opinion of the Court, whether the delivery of the tea, and the acceptance of it by the wharfinger, for the purpose of transmitting it

A., a merchant in *London*, had been in the habit of selling goods to *B.*, resident in the country, and of delivering them to a wharfinger in *London*, to be forwarded to *B.* by the first ship. In pursuance of a parol order from *B.*, goods were delivered to, and accepted by the wharfinger to be forwarded in the usual manner: Held, that this not being an acceptance by the buyer, was not sufficient to take the case out of the 29 C. r. 2. c. 5. s. 17.

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by the usual conveyance, was to be deemed an acceptance by the buyer within the meaning of the 29 Car. 2. c. 3. s. 17. The jury having found a verdict for the plaintiffs, a rule nisi was obtained in last *Easter* term for entering a nonsuit, against which

Scarlett and *Littledale* now shewed cause. The acceptance of the tea by the wharfinger was a sufficient acceptance by the buyer to satisfy the 29 Car. 2. c. 3. s. 17. *Staunton* was the agent of the defendant; for the jury having found that there was an order for these goods, it must be taken that there was an order to send them by the usual mode of conveyance. The acceptance therefore by *Staunton* was an acceptance by the defendant. This case is distinguishable from *Astey v. Emery* (a), for there the seller undertook the risk of conveying the goods to the purchaser.

Gurney and *Chitty* contra. The statute 29 Car. 2. c. 3. s. 17. enacts, "that no contract for the sale of goods for the price of 10*l.* shall be binding, except the buyer shall accept part of the goods so sold, and *actually receive* the same." Here there has been no acceptance by the buyer, but by a person who was an agent only for the purpose of shipping the goods, and which agent had no opportunity of objecting to the quality. To make it a sufficient acceptance by the buyer within the statute, the latter ought to have had an opportunity of objecting to the quality of the goods, *Kent v. Hustisson* (b), and *Howe v. Palmer*. (c) In *Astey v. Emery*, the goods were actually shipped on board a vessel,

(a) 4 *Maule & S.* 262.(b) 3 *Bos. & P.* 252.(c) 3 *Barn. & A.* 521.

named by the buyer, and yet that was held not to be a sufficient acceptance. They also cited *Dawes v. Peck.* (a)

Cur. adv. vult.

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ABBOTT C. J., in the course of the term, delivered the judgment of the Court, and after stating the point reserved for their consideration, viz. whether there had been a sufficient acceptance of the goods to take the case out of the statute of frauds, added, that the Court were of opinion that the acceptance in this case, not being by the party himself, was not sufficient: and he referred to the case of *Howe v. Palmer*, where it was held that there could be no actual acceptance so long as the buyer continued to have a right to object either to the quantum or quality of the goods.

Rule absolute for a nonsuit.

(a) 8 T. R. 330.

RULES OF COURT.

IT IS ORDERED, That from and after the last day of this term, whenever two or more notices of justification of bail shall have been given, before the notice on which bail shall appear to justify, no bail be permitted to justify without first paying (or securing, to the satisfaction of the plaintiff, his attorney, or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed; and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected.

By the Court.

It

CASES IN HILARY TERM, &c.

1822.

IT IS ORDERED, That from henceforth, no clerk, turnkey, officer, or other person, employed by or under the marshal, shall receive or take, except from the marshal, any fee, gratuity, or reward, for or in respect of making enquiry into the sufficiency of any person or persons proposed or intended to give security upon the granting of the rules of the King's Bench prison, or otherwise in respect of the granting of the said rules. And that the marshal do dismiss any person who shall offend herein. AND IT IS FURTHER ORDERED, That a copy of this rule be kept hung up in the said prison, in the place where the table of fees is hung up.

By the Court.

In order to prevent the fraudulent issuing of any writ of execution, without a judgment to support it, IT IS ORDERED, That the seal of the writs of this court shall not seal any writ of fieri facias, or capias ad satisfacendum, without having the judgment-paper, postea, or inquisition, produced to him. AND IT IS FURTHER ORDERED, That the attorney concerned for the plaintiff in the cause, or his agent, shall, upon all bailable process, and every writ of attachment, and fieri facias, and capias ad satisfacendum, indorse the place of abode, and addition of the party against whom the writ is issued (or such other description of him as such attorney or agent may be able to give). AND IT IS ALSO ORDERED, That no judgment be signed upon any cognovit, without such cognovit being first produced to the clerk of the dockets, and, after taxation of the costs, filed with him.

By the Court.

C A S E S

ARGUED AND DETERMINED

1822.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Third Year of the Reign of GEORGE IV.

GOLDING RAY the younger *against* PUNG.

THE Vice Chancellor sent the following case for the opinion of this Court.

By indentures of lease and release, dated the 25th and 26th September, 1800, certain lands, &c. in Essex, were duly conveyed and assigned by Golding Ray the elder, his heirs and assigns, to the use of such persons, and for such estates, and in such proportions, and for such terms of years, and under such provisoos, &c. and subject to such charges, and in such manner as James Ray, by any

Certain lands were conveyed by A. B., his heirs and assigns, to such uses as C. D. should by deed appoint; and in default of, and until appointment, to the use of C. D. in fee. C. D. afterwards, in execution of the power, by deed duly made an appointment of the said estates in favour

of E. F. in fee. C. D., at the time of making the appointment, was married. His wife was held not to be deurable out of those lands.

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deed

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against
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deed or deeds by him signed, sealed, and executed in the presence of, and attested by two or more credible witnesses, should from time to time declare, direct, limit, or appoint the same; and as to the estate or estates so to be appointed, if any should be, which should respectively end and determine; and as to such part and parts of the said premises whereof no such declaration, limitation, or appointment should be made, and in default of, and in the meantime, until any such should be made, to the use of *James Ray*, his heirs and assigns, for ever. *James Ray* afterwards duly made, and executed, in the presence of two credible witnesses, certain indentures of lease, appointment, and release, dated the 29th and 30th of *March*, 1816; by which it was witnessed, that *James Ray*, for the valuable consideration therein mentioned, by virtue of the power or authority to him given by the first-mentioned indentures, and of all and every other power, and powers him in any wise enabling in that behalf, did irrevocably declare, limit, and appoint, that all the said lands, &c. should, from and after the execution of those indentures, remain and be to the uses upon the trusts, and for the intents and purposes thereafter limited, expressed, and declared concerning the same; and by the same indenture it was also witnessed, that for the consideration aforesaid, and for further assurance, *James Ray* did grant, bargain, sell, release, and confirm unto the plaintiff, *Golding Ray* the younger, in his possession then being by virtue of the said lease, and to his heirs, the said lands, &c.; to hold the same unto the said *Golding Ray* the younger, his heirs and assigns, to the uses, upon the

the trusts, and for the intents and purposes thereinafter expressed and declared concerning the same; and it was by the same indenture declared, that as well the appointment as also the grant and release thereinbefore contained, should respectively operate and enure to certain uses, and upon certain trusts therein expressed and contained in favour of *Golding Ray* the younger. *James Ray*, at the time of the execution of the last mentioned indentures in 1816, was married: and he and his wife are still living. The question for the opinion of the Court was, whether, under the circumstances, the wife of *James Ray* would be dowable out of the lands, tenements, and hereditaments comprised in the hereinbefore stated indentures, in case of her surviving her husband. The case was argued at the sittings before last *Michaelmas* term, by

Preston, for the plaintiff. The right to dower was defeated by the execution of the power. It may be propounded as a general rule, that if an estate be conveyed regularly and formally to such uses as the settlor shall appoint, and in the meantime, and until appointment, to the use of himself and his heirs, the settlor has a qualified and determinable fee, to continue until by the exercise of the power of appointment, the fee shall vest in the person to whom it shall be appointed. (a) To this fee dower is incidental; the wife is dowable of it while it continues, and so far as her title to dower may not be excluded, postponed, or defeated by appointment. When the settlor makes an appointment,

(a) *Buller's note to Co. Litt. 216. a. and 241. a.*

he therefore is in quasi by the act of the donor, and the case is to be considered as if the husband never had taken the fee. For that fee was defeated, and never became absolute; and in the result the wife is, therefore, not dowable. Her title to dower was as defeasible as her husband's fee, and was defeated when that fee was overreached and avoided by the operation of the appointment made in exercise of the power. In *Maundrell v. Maundrell* (*a*) Lord *Eldon* says, "The fee vests until the execution of the power, and the execution of the power is a limitation of the use, under and by the effect of the instrument by which the power was reserved. When a conveyance operates on the fee only, and there is not any execution of the power, then dower attaches; but when the power is executed, the right to dower is extinguished." The opinion of *Heath J.* in *Cave v. Holford* (*b*), is an authority to the same effect. When a doubt was expressed by Lord *Alvanley*, in *Cox v. Chamberlain* (*c*), the point was not judicially before him. In the case of *Sammes v. Payne* (*d*), and *Buckworth v. Thirkell* (*e*), the question was, whether the husband was entitled to curtesy, and that is a very different question from the present. Besides, the authority of the latter case (*f*) has been frequently questioned. In *Moreton v. Lees* (*g*), a case exactly like the present, it was expressly held by *Richards C. B.*,

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RAY
against
PUNG.(*a*) 10 *Ves.* 255.(*b*) 5 *Ves. jun.* 657.(*c*) 4 *Ves. jun.* 631.(*d*) 1 *Leon.* 168.(*e*) 3 *Bos. & Pud.* 658.(*f*) *Parke on Dower*, 181. *Sugden on Powers*, 333. *Butler, Co. Lit.*
241. n.(*g*) *Sugden on Powers*, 339.

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against
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appointment, and in default thereof an estate for life, remainder to his heirs, the Master of the Rolls held, that if the power was good, yet that a purchaser, taking by a conveyance adapted to pass the interest of the estate as a limitation of the fee, and not as an appointment, was subject to the wife's claim of dower; and in delivering the judgment, he says, "The power of appointment is merely nugatory, and nothing distinct or different from the fee: the fee was clearly in the husband, until appointment. In *Goodill v. Brigham* it was held, that a power added to the fee was merely void. So the power in this case, followed by a limitation of the fee, must be absorbed in the fee, which includes every power. The reason commonly given why a power may have effect, though limited to the owner of the fee, is, that he may appoint in a mode by which his legal fee would not entitle him to convey. I give no opinion upon the sufficiency of that reason; but in this case, it is to such uses as he should by deed or will appoint, that is, by deed or will, legally executed; and by those instruments he might have passed the fee, though nothing was said about the appointment: the limitation, therefore, operates purely as a limitation of the fee, and that fee he could only convey, subject to her right of dower." It is true, that in *Maundrell v. Maundrell (a)*, Lord Eldon expresses a decided opinion, that a power capable of being executed may be reserved to the person having the fee; but he does not say that the consequence of executing the power would be to deprive the wife of dower. In *Cross v. Hudson (b)* the party had the power to charge an estate,

(a) 10 Ves. 246.

(b) 5 Bro. C. C. 30.

tenements, and hereditaments comprised in the herein-before stated indentures, in case of her surviving her husband.

1822¹

 Recd
against
Pence²

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

**The Earl and Countess of JERSEY and Others,
against DEANE.**

THE Vice Chancellor sent the following case for the opinion of this Court. By indentures of lease and release, dated the 15th and 16th December, 1806,

By marriage settlement, dated December, 1806, certain manors and lands were

limited to the husband for life; remainder to the wife for life; remainder to the use of the first and other sons of the marriage successively in tail male; remainder in case the wife should survive the husband, to her in fee; but if she should die in the lifetime of her husband, remainder to the daughters successively in tail male; remainder to the use of such persons related by blood or consanguinity, and in such estates or interests, and in such manner, and charged with such sums of money in favour of such persons so related, as she by her will might appoint; and in case of no such appointment, to her in fee. The settlement also contained a power for the trustees there named, at the request, and by the direction, of the husband and wife, or the survivor, to sell or exchange the settled estates, and for that purpose, to revoke all and any of the uses contained in the settlement; and also a covenant by the husband for further assurance on his part, and that of his wife, and all persons claiming under him. In pursuance of this settlement, certain fines were levied. By deed dated March, 1807, reciting the settlement, and the fines levied in pursuance thereof, and the limitations therein contained, and further, that the wife was desirous of acquiring an absolute power of appointment over the manors, &c. comprised in the settlement, in the event of her surviving, or dying in the lifetime of her husband, and there being a general failure of issue of her body, inheritable to the manors, &c. under the settlement, the husband and wife covenanted to levy certain fines, surcouf, et droit come coo, with proclamations, to J. G. and his heirs, of all the manors, &c. comprised in the settlement: which fines were to operate, and to be taken to operate first for reimbursing the uses contained in the settlement antecedently to the limitations to the use of the wife in fee-simple, and subject thereto to the use of such persons, &c. as the wife by will or deed might appoint. In pursuance of this latter deed, several fines come coo were levied by the husband and wife: Held, that under these circumstances, these latter fines did not operate to extinguish, destroy, or suspend the right or power of the husband and wife, and the survivor of them, to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees.

being

1822.

*Earl of Jersey
and Others
against
Drake.*

being the settlement made after, but in pursuance of, articles entered into before the marriage of the Earl of *Jersey* with the Countess of *Jersey*, his wife, and by certain fines duly levied by the Earl of *Jersey* and his wife, certain hereditaments, the inheritance of the Countess of *Jersey*, were limited to the use of *T. F.* and *John Lord B.*, their executors, &c. for ninety-nine years, to commence from the 23d of *May*, 1804, but upon the trusts thereafter mentioned; with remainder to the use of the Earl of *Jersey* and his assigns, for his life, without impeachment of waste, &c.; with remainder to the use of the Duke of *Bedford* &c., as trustees, to support contingent remainders; with remainder, in case the Earl of *Jersey* should die in the lifetime of the Countess of *Jersey*, leaving issue an eldest or only son, entitled to the said hereditaments, immediately expectant upon the decease of the Countess of *Jersey*; and who should, at the decease of the Earl of *Jersey*, have attained, or should, during the life of the Countess of *Jersey*, attain twenty-one, then to the intent that he, after attaining twenty-one, and during the joint lives of himself and the Countess of *Jersey*, should receive a certain yearly rent-charge therein mentioned, payable out of the said hereditaments, with usual powers of entry, &c., for better securing the due payment of the same; and subject thereto to the use of the Earl of *Clarendon* and Lord *Lowther*, their executors, &c. for the term of one thousand years, to commence from the decease of the Earl of *Jersey*, without impeachment of waste; upon certain trusts; with remainder to the use of the Countess of *Jersey*, and her assigns, for her life, without impeachment of waste, &c.; with remainder to the use of the Duke of *Bedford* &c.,

as trustees, to support contingent remainders; with remainder to the use of the first and every other son of the marriage successively, in tail male; with remainder, in case the Countess of Jersey should survive the Earl, to the use of her, her heirs and assigns for ever; but in case she should die in the lifetime of the Earl, then to the use of the first, and every other the daughter and daughters of the marriage successively, in tail male; with remainder to the use of such person or persons related by blood or consanguinity to the Countess of Jersey, and for such estates or interests, and in such manner, and subject to, and charged or chargeable with, such annual or other sums of money in favour of such persons so related, and subject to such powers, &c. (such sums of money, powers, &c. being for the benefit of some one or more persons, related by blood or consanguinity to the Countess of Jersey,) and in such manner as the Countess of Jersey, notwithstanding her coverture, by her last will in writing, or by any codicil thereto, signed and published in the presence of three or more credible witnesses, should direct, limit, or appoint; and in default of such direction, &c. and so far as any such, if incomplete, should not extend, to the use of the said Countess in fee. And it was by the said indenture of release, among other things, declared, that it should and might be lawful to and for the Duke of Bedford &c., and the survivors or survivor of them, and the executors and administrators of such survivors, at any time or times thereafter, at the request and by the direction of the Earl and Countess of Jersey, during their joint lives, and of the survivor of them, testified by some writing under their respective hands and seals, or under the hand and seal of the survivor,

attested

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Earl of Jersey
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DEANE.

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and Others
against
DRAKE.

attested by two or more credible witnesses, to dispose of, either by way of absolute sale or in exchange for or in lieu of other lands, &c. to be situate somewhere in England, all or any part of the manors, &c. thereby granted and released, (except the mansion house, &c. called *Osterley*,) and the inheritance thereof in fee simple, to any persons whomsoever, for such price, or for such equivalent, in manors, lands, &c. as to the said Duke of *Bedford*, &c. or the survivors or survivor, &c. should seem reasonable; and that, for the purpose of effecting such sale or exchanges, it should be lawful for the said Duke of *Bedford*, &c. the survivors and survivor of them, &c. at such request, and by such direction, and so testified as aforesaid, by any deed or deeds, instrument or instruments in writing, sealed and delivered in the presence of, and attested by, two or more credible witnesses, absolutely to revoke, determine, and make void all and any of the uses, trusts, powers, &c. therein contained, of and concerning the hereditaments so proposed to be sold or exchanged, or any part thereof; and by the same or any other deed or deeds to limit, &c. any uses, estates, or trusts of the said hereditaments, the uses of which should be so revoked, which it should be thought expedient to limit, &c. in order to effectuate such sales or exchanges; and that it should likewise be lawful for them to give effectual discharges and receipts to the purchasers, upon payment of their respective purchase monies. And in the said indenture of settlement was contained a covenant by the Earl of *Jersey*, for further assurance on his part, and on the part of the Countess of *Jersey*, and all persons claiming under him the said Earl of *Jersey*.

By

By an indenture bearing date the 20th day of *March*, 1807, and made between the Earl and Countess of *Jersey*, his wife, of the one part, and *T. G.* of the other part, reciting the said indentures of lease and release of the 15th and 16th days of *December*, 1806, and the fines levied in pursuance thereof, and the limitations contained in the settlement, and reciting that the said Countess of *Jersey* was desirous of acquiring an absolute power of appointment over the manors and other hereditaments comprised in the settlement, on the event either of her surviving or dying in the lifetime of the said Earl of *Jersey*, and there being a general failure of issue of her body inheritable to the said manors and other hereditaments under the limitations contained in the settlement, it was witnessed, that, for the purpose thereinbefore mentioned, the Earl of *Jersey* did thereby, for himself, his heirs, &c. and for the Countess of *Jersey*, his wife (she thereby consenting thereto), covenant and grant to *T. G.*, his heirs and assigns, that they the Earl and Countess of *Jersey* would, as of *Easter or Trinity term*, 1807, or some other subsequent term, at the costs of the Countess of *Jersey*, levy nine or more fines, sur conuance de droit come ceo, &c., with proclamations, unto the said *T. G.* and his heirs, of all the manors, &c. mentioned and conveyed by the above settlement, and fines levied in pursuance thereof, with their respective rights; and it was thereby agreed and declared, between the said parties thereto, that as well the said fines so as aforesaid, or in any other manner so to be had and levied, and also all other fines, common recoveries, &c. already or thereafter to be levied, suffered, or executed between the said parties thereto, of the said manors, &c. should, immediately after the levying,

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and Others
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**Earl of Jersey
and Others
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levying, suffering, and perfecting of the same, respectively operate and be taken to operate, first, for corroborating the several uses, trusts, &c. limited, expressed, and contained, of and concerning the said manors, &c. by the settlement, antecedently to the several limitations therein respectively contained to the use of the Countess of *Jersey* in fee simple; and after the expiration or sooner determination of the several uses, trusts, &c. and in the meantime subject to the same respectively, to the use of such persons, for such estates, upon such trusts, &c. and subject to such powers, &c. as the Countess of *Jersey*, by any deed or deeds, &c. with or without power of revocation or new appointment, to be sealed and delivered by her, in the presence of two or more credible witnesses, or by her last will in writing, or any codicil thereto, or any writing purporting to be her last will, or any codicil thereto, signed and published in the presence of three or more credible witnesses, should from time to time, either in the lifetime of the Earl of *Jersey*, or after his decease, and notwithstanding her then present or any future marriage, direct, limit, or appoint; and in default and until such direction, limitation, or appointment, or so far as any such direction, limitation, or appointment should not extend, to the use of the Countess of *Jersey*, her heirs and assigns, for ever. In pursuance of the covenant for that purpose contained in the last-mentioned indenture, nine several fines, sur conuzance de droit come CEO, &c. were duly levied by the Earl of *Jersey* and his wife, in *Trinity* term, 1807, of the several manors, &c. in the above indentures mentioned. On the 15th day of *June*, 1816, certain freehold lands and hereditaments comprised in the said recited indentures

were

were put up for sale, and the defendant, *Ralph Deane*, became the purchaser, for the sum of 4010*l.*, and paid a deposit of 20*l.* per cent. upon the purchase-money, and signed a written agreement to complete his purchase on or before the 11th day of *October*, 1816, on having a good title made. The question for the opinion of the Court was, whether the fines levied by the Earl and Countess of *Jersey*, in *Trinity* term, 1807, did or did not operate to extinguish, destroy, or suspend the power or right of the Earl and Countess, and the survivor of them, to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in their marriage-settlement, so as to prevent an exercise of those powers by the trustees of the settlement. The case was argued in last *Michaelmas* term, by

Lynch, for the plaintiff, who contended, first, that the fines were levied by persons one of whom had the fee, and that they were a rightful and not a wrongful or divesting assurance. Secondly, that although a fine is an acknowledgment upon record of a fee simple in the conusee, and will, unless controled by the agreement of the parties, have a divesting operation; yet that its operation is not of that inflexible nature, but that it bends to and is controlled by the agreement of the parties, for the purpose of effecting any particular or special purpose. Thirdly, that the fines were by the settlors, and were expressly, and were so declared to be, for further assurance, and in confirmation of the prior uses contained in the settlement.

Bredon's case (*a*), is an authority in support of

(*a*) 1 Rep. 76. a.

the

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the first point: there, tenant for life and first remainder-man in tail joined in a fine, come ~~cōs~~; and yet the Court held it no discontinuance either of the first or second remainder in tail, because each of the parties joining in the fine gave but that only which he might lawfully give, viz. the tenant for life his estate, and he in the remainder a fee simple, determinable on his estate tail; and so it was held no forfeiture of the estate of the tenant for life. In the Earl of *Clanrickard's* case (*a*), this doctrine was confirmed by Lord *Hobart*; and in *Treport's* case (*b*), *Popham C. J.* says, "If tenant for life, and he in reversion, make a gift in tail, rendering rent, the lessee shall have the rent during his life, for the making of a greater estate than he has, is not any forfeiture, because he joins with him in reversion." Lord *Holt's* argument in *Lane v. Vane* (*c*), puts the question on the same ground, and confirms the authority of the preceding cases. The case of *Smith v. Cliffford* (*d*), is also in point. There the tenant for life, having himself a distant remainder in tail, suffered a recovery; and though there was in that case an intermediate estate, yet it was held to be no ground of forfeiture, because he had not taken upon himself to do any act inconsistent with his ~~intermediate~~ estate. Yet in that case there was no intention shewn, ~~in~~ here, to preserve the intermediate estate; and that ~~case~~, therefore, is stronger in favour of the position contended for. It may be said, that that was the case of a recovery, where the tenant for life having parted with his ~~estate~~ for life at the time, was vouched only in respect of ~~the~~

(*a*) *Hob.* 278.

(*c*) *Sir T. Jones*, 98.

(*b*) *6 Rep.* 15.

(*d*) *1 T. R.* 738.

estate

estate fail; but the judgment did not proceed on that ground; for *Pelham's case* (*a*) was also the case of a recovery, and yet held a forfeiture. It is indeed remarkable, that in 2 Rep. 74., and 10 Rep. 44., Lord Coke cites *Pelham's case* as one of a tenant for life suffering a recovery, and conveying away the fee. That case, however, was overruled by *Smith v. Clyfford*; and it is not true that in the latter case, the tenant for life had not the estate for life in him when reached. For 2 Inst. 241, and Com. Dig. tit. *Voucher*, both shew that the vouchee stands in the place of the tenant; and that the demandant counts against him for the whole fee. *Garrett v. Blizzard* (*b*) will be cited on the other side; but that case turned on the intention of the parties, which was to do an act inconsistent with the intermediate estate. Here there was no such intention, and therefore this fine produced no forfeiture; besides, in this case, Lady Jersey had the first estate of inheritance. *Roper v. Halifax*, *Sugden on Powers*, last edit. 55. Appendix, 641., is also an authority in point. But it will be contended, that the effect of a fine is so powerful, that although these parties meant to confirm the prior uses and estates, yet they are divested; and that though the old seisin is affirmed, yet that it is defaced. But this is not so: for, secondly, although a fine is an acknowledgment upon record of a fee simple in the donee, and will, unless controlled by the agreement of the parties, have a divesting operation; yet its operation is not of that inflexible nature, but that it belongs to and is controlled by the agreement of the parties, for the purpose of effecting any particular or special purpose. In support of this proposition, *Pattenham v.*

(*a*) 1 Rep. 14.(*b*) 1 Roll. Ab. 885.

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Duncombe (a) may be cited: there a fine was held to be controlled by the former indenture, which shall rule the fine. So also *Fitz. H. Estopel*, 211., and the third resolution in *Cromwell's* case. (b) *Perrot's* case (c), *Anonymous* (d), are to the same effect. And *Bullock v. Thorne* (e), Earl of *Leicester's* case (f), and *Herring v. Brown* (g), shew that it is entirely a question of intention, and that the operation of a fine is to be controlled by the agreement of the parties. These latter cases, it may be said, are those where a fine, coupled with a deed, has been held an execution of the power, but that they do not shew that it can operate as a confirmation. But there is no real difference between the two cases; for if the displacing and destroying power of the fine be prevented by the object of the parties being to execute a power, why should not the same effect be produced by the object of the parties being to confirm a power? The innocent intention of the party levying the fine is the same in both cases, and that is the cause why the fine is prevented from extinguishing the power. Many cases may indeed be found where tenants for life levying fines have incurred forfeiture; but all these cases will be found either to be where there was a clear intention to gain a fee, or where, from their incautiously omitting to declare the uses, the Court have been obliged to presume that intention. *Smithe v. Abell* (h), *Albany's* case (i), *Digges's* case (k), shew this: and in the last case the uses declared by the deed intended to be enrolled were different from the uses declared by the deed by which the fine

(a) 2 *Dyer*, 157. b.(b) 2 *Rep.* 69. b.(c) *Moore*, 384.(d) *Skinner*, 238.(e) *Moore*, 615.(f) 1 *Vent.* 278.(g) *Carr.* 22. 1 *Vent.* 368. S. C.(h) 2 *Lev.* 202.(i) 1 *Rep.* 119.(k) 1 *Rep.* 173.

was

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was covenanted to be levied; and, therefore, the two could not be connected together. Cases may be cited, no doubt, to shew that the operation of a fine is so strong, that when a man makes a will, and afterwards levies a fine, the fine is a revocation of the will; but this goes on the ground, that in order to render a devise valid, the seisin of the devisor must remain unaltered from the execution of the will till his death. This explains the case of *Lutwich v. Mitton* (*a*), unless, indeed, that case be considered as overruled by *Selwyn v. Selwyn* (*b*). But, thirdly, in this case the fines were levied by the settlors, and were expressly, and were declared to be for further assurance, and in confirmation of the prior uses contained in the settlement. In the case of *Selwyn v. Selwyn*, the ground of the decision was, that the whole was taken as one conveyance, which must relate to the bargain and sale; and *Roe v. Griffiths* (*c*) is to the same effect. And if a person convey by lease and release to the use of himself for life, with remainders over, and covenants to levy a fine, and the fine is levied in a subsequent term, the fine operates to confirm the uses declared by the deed. This shews that a fine is controllable by the act of the parties. Here the fine is not only connected with the deed of covenant, but also with the original settlement, by means of the covenant for further assurance. Now, if the fine had all that divesting and displacing operation attributed to it, it could not confirm all the prior charges and incumbrances of the tenant in tail: it is also equally clear law, that if tenant in tail conveys his estate to several

(*a*) 8 *Viner*, 133.(*b*) 2 *Burr.* 1131.(*c*) 4 *Burr.* 1952.

clear that the parties never intended to disturb the settlement. Then, if it can operate as a further assurance, and, consequently, is part of the original assurance, why should it defeat or divest the seisin? But even if the intention did not appear on the face of the deed, still the law would intend a rightful rather than a wrongful motive, particularly so when it is for the benefit of the persons in remainder that the fine should be considered for further assurance, and as a confirmation rather than a wrongful alienation. *Cromwell's* case is one authority to shew that the Court will construe several conveyances as a part of the same assurance, for the purpose of effectuating the intention of the parties; and in the case of *Doe v. Whitehead* (a), Lord Mansfield's judgment puts the question beyond all doubt. If these propositions be correct and founded in law, it necessarily follows that the seisin under the settlement was not disturbed or divested; and, therefore, the powers of sale and exchange vested in the trustees were not affected by the fines: and if the fines levied by Lord and Lady Jersey did not disturb or divest the seisin, if they did no act inconsistent with the estate, if no forfeiture was incurred by them, it is scarcely possible to conceive how the power or right in Lord and Lady Jersey to require or direct a sale can be destroyed or suspended. But supposing that Lord and Lady Jersey did an act inconsistent with the estate, that they incurred a forfeiture, and that the fines levied by them displaced and divested the seizin; yet there is ground to contend that their power of requesting or directing will not be affected by any such acts. The power of requesting and directing

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(a) 2 Burr. 704.

estates were divested and turned to a right. It is laid down in *3 Bac. Abr.* 194. tit. *Fine*, and in *Hunt v. Bourne* (*a*), that a fine must convey a fee simple, unless the express acknowledgment of the parties qualify it. The parties, therefore, must put their intention on the record, or otherwise they will create for themselves a tortious fee. And this is necessary, to prevent the parties using this powerful assurance from turning it into a wrong. *Smith v. Clyfford*, and *Roper v. Halifax*, which have been cited on the other side, are both cases of a recovery. Now, a recovery may operate upon particular parts of the estate, but a fine cannot do so. The ground of the decision in *Smith v. Clyfford* was, that it was a question, whether it was a forfeiture within the statute of *Elizabeth*, which the Court held applied only to a bare tenant for life; and they thought it no forfeiture, inasmuch as the recovery had a legal subject to work upon, viz. the ultimate remainder in tail, and passed over the intermediate estates tail: but the operation of a fine is very different. In *Roper v. Halifax*, the tenant conveyed away the estate to trustees during the joint lives of herself and her husband, to secure 300*l.* a year pin-money; remainder to the use of her husband for life; remainder to herself for life, and other remainders over; leaving the reversion of her old estate in herself, in order to support the powers: and there the subsequent instrument was an innocent conveyance, and contained an express reservation of the powers. That case, therefore, has nothing to do with the present. The result of all the authorities proves, that the effect of this fine is to produce a forfeiture.

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1822. But it is contended by the other side, secondly, that its operation may be controlled by the agreement of the parties, for effecting any particular or special purpose. If that agreement appears in the concord of the fine, it is so, but not otherwise. Such an agreement may indeed be binding on the parties to the fine, but not, except in the case put, upon third parties; and, therefore, if it is not contained in the record, the remainder-man may enter for a forfeiture. No case has been or can be cited to which this observation will not be found to apply. Suppose tenant for life levies a fine, and declares the uses of it, but not on the record, having in fact the intention to gain a wrongful fee; if the remainder-man brings ejectment, and the deed declaring the uses were produced on the trial, and it should then appear that the fine come *cœs* was to operate only as a confirmation of the remainder-man's estate, would that be a defence? If so, the tenant for life might run no risk: he might declare the uses by a secret instrument, to be produced, if necessary, and if not, to be destroyed, as soon as it is too late for the remainder-man to enter; or he may execute two declarations, and produce, ultimately, whichever happens to be most advantageous to him. All this is prevented by holding that the agreement must be put on the record; and that, if on the record he makes a wrongful declaration of the uses of the fine, it will amount to a forfeiture of his estate. In *Puttenham v. Duncombe* (^a) the two instruments were dated on the same day; and of course, therefore, formed but one assurance. Besides, *Puttenham* was seized in fee; and no question of forfeiture was there

(a) 2 Dyer, 157. b.

raised;

raised; and there it was not a question with a third party, which makes all the difference. In *Cromwell's* case, *Bland* being seised either in fee or in tail of the manor, conveyed it to *Andrews*, with a covenant to levy a fine, and with a condition of re-entry, if *Andrews* did not re-convey the advowson to *Bland*; a fine was levied, sur grant and render; and *Andrews* having died without re-conveying, *Bland* re-entered. There it was held, that the fine did not operate to prevent him, for the whole was one assurance; but there, the interest of third persons was not involved. The same answer may be given to *Perrot's* case, and *Anonymous*. (a) The other cases cited on this point are either cases arising under peculiar circumstances, and, with one exception, not cases of forfeiture, or cases where it has been held, that fines levied in execution of a power do not destroy it; and it is contended, that there is no difference between a fine in execution and in confirmation of a power. In the Earl of *Leicester's* case it is clear, that the Court might have held that the deed by which he covenanted to levy the fine to other uses was a revocation of the former use; besides, no forfeiture was then involved. In *Bullock v. Thorne* the fine was levied by the tenant in tail, and, consequently, was not wrongful; besides, the case fell within 27 *Eliz.* c. 14, as to voluntary conveyances. The only part of the case applicable to the present is a dictum at the end, which was not necessary to the decision. The case of *Herring v. Brown* was decided first in the King's Bench, where it was held, that the power was destroyed by the fine subsequently levied. This decision was

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~~Conyngham~~
~~Quinton~~

(a) *Sirn. 232.*

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1822. afterwards overruled in the Exchequer Chamber, by six Judges to two; but one of the six decided on the ground, that, though the power was destroyed, yet the party claiming was barred, because his ancestor was conusee of the fine. That case, therefore, is no authority where the rights of third parties are introduced. The result is, then, that in the cases it is generally and broadly laid down, that a fine by tenant for life is a forfeiture, and that he cannot relieve himself from it by any agreement not introduced upon the record itself. But, thirdly, it has been argued, that the fines in this case were, and were declared to be for further assurance, and in confirmation of the prior uses contained in the marriage-settlement, and that Lord and Lady Jersey were in a condition to give further assurance, and were bound so to do. If, indeed, the deeds executed, and the fines levied in 1806, to carry into effect the articles entered into before marriage, can be considered as one assurance with those of 1807, the argument is at an end. But that cannot be so; for the deeds and fines in 1806, together, make one complete and perfect assurance: and those in 1807 were for the very purpose of making alterations therain; and being so, they cannot form one assurance together. *Selwyn v. Selwyn* (a) was the case of a recovery, and does not apply, unless it can be shown that there is not any difference between a fine and a recovery in this respect. It is argued, indeed, that *Lutwicke v. Mitton*, which was the case of a fine, was overruled by it; but the two cases go on very different principles. In *Roe v. Griffits and Others*, the ground of the decision was,

(a) 4 Quiv. 1252.

that

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that the testator had the reversion in fee in him, which was not affected at all by his admission under the surrender to the uses contained in his marriage-settlement. Neither this case, therefore, nor *Goodright v. Mead*, nor *Ferrers and Curson v. Fermor and Others*, are applicable to the present. But the case of *Doe v. Whitehead* (a) is a strong authority. There Lord *Manfield* stated, that if you could distinguish the conveyance, and suppose *Timothy Stoughton* to have been only tenant for life, at the time of his levying the fine, it would be the forfeiture of his estate for life; and he afterwards, in deciding the case, says, "I look upon all this as one assurance. If they were distinct conveyances or assurances, this fine would be a forfeiture of his estate for life under the new settlement." This, therefore, is an authority to shew that if the assurances are in this case distinct, the fine operates to produce a forfeiture. Now, how is it possible to consider the whole in this case as one assurance? Here, the first deed, after limiting the estate in a different manner, according as either Lord or Lady *Jersey* might happen to survive, contained a power of appointment by Lady *Jersey*, limited, however, to persons related to her by blood or consanguinity; but the second deeds give her an absolute power of appointment, without any such limit. They are, therefore, so far, at least, in discordance with the former, and cannot, independently of the interval of time and the other circumstances before alluded to, be considered as forming one assurance. If these general positions be allowed, it must follow that this power of Lord and Lady *Jersey*, to request and direct a sale, is

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JOHN HATFIELD *against* JAMES THORP.

THE following case was sent by the Master of the Rolls for the opinion of this Court.

John Steemson was, at the respective times of making his will and of his death, seised in fee simple of a freehold messuage, house, and garden, situate at Newark, in the county of Nottingham; and being so seised, made his last will in writing, bearing date the 18th of November, 1779, and thereby devised to his daughter, *Mary Bell*, "All that his messuage, house, and garden, at Newark aforesaid; and at his daughter *Mary Bell's* death, the messuage and appurtenances to his daughter *Elizabeth Hatfield* and her heirs, for ever. The said *John Steemson* signed and published his will in the presence of *Ann Hill*, *Samuel Leonard*, and *Thomas Hatfield*, who respectively attested the same in his presence, and in the presence of each other. *Thomas Hatfield*, one of the attesting witnesses to the will, was, at the time of his attestation, the husband of the said *Elizabeth Hatfield*, the daughter of the testator. *John Steemson* died shortly after making his will, without having altered or revoked the same, leaving the said *Mary Bell*, *Elizabeth Hatfield*, and *Thomas Hatfield*, surviving him. *Elizabeth Hatfield* died on the 9th of April, 1813, in the lifetime of *Mary Bell*, without having done any act to dispose of the interest (if any) which she took under the will of *John Steemson*, leaving *Thomas Hatfield*, her husband, and the plaintiff, *John Hatfield*, her eldest son and heir-at-law, surviving her. *Thomas Hatfield* died in January,

An estate in fee, upon the determination of a life estate, was devised to the wife of *A. B.*: *A. B.* was one of the attesting witnesses to the will. The testator died in 1779, and the wife of *A. B.* died in 1813, before the previous life estate was determined: Held, that *A. B.* was not a good attesting witness to this will.

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1819, and *Mary Bell* on the 10th day of *April*, 1820. The question for the opinion of this Court was, whether the will of *John Steemson* was duly attested to pass any, and what estate, in the messuage, garden, and premises at *Newark*, to *Elizabeth Hatfield*.

Cockerill, for the plaintiff. *Thomas Hatfield*, the witness upon whose attestation this question arises, was a credible witness, within the meaning of the statute of frauds; and this will was therefore duly attested, so as to pass the real estate. There are conflicting authorities upon the question, whether the interest which renders the attesting witness to a will incompetent, is an interest at the time of the attestation, or at the time when his testimony is required. In *Holdfast on the demise of Anstey v. Dowsing* (*a*), 19 G. 2., a person who took under a will an annuity charged upon the real estate devised, was held not to be a credible witness, within the meaning of the statute; and Lord Chief Justice *Lee*, in delivering the opinion of the Court, argued as if the objection of benefit from the will to the witness, at the time of subscribing, could not be removed or be taken off by any subsequent fact. In that case, however, the witness had an interest at the time of the trial. That decision occasioned the passing of the stat. 25 G. 2. c. 6., which, however, applies only to wills made after the 24th *June*, 1752. In *Wyndham v. Chetwynd* (*b*), 31 G. 2., a similar question arose: the testator, in that case, died in 1750, leaving a will, (by which he charged his real estate with the payment of his debts and legacies) attested by his two attorneys and apothecary, he being indebted to each of them at the

(*a*) 2 *Str.* 1253.(*b*) 1 *Burr.* 414.

time

time of the attestation, for their professional services. Their several debts were paid before the day when the cause was tried, when their testimony was required to prove the will, and the Court of King's Bench were of opinion that the will was duly attested. So also in *Lord Aylesbury's* case, there cited, the testator had left legacies charged on his lands to three servants, who attested his will; they released the legacies before examination, and it was held that the will was duly attested. In *Baugh v. Holloway* (*a*), Sir *Robert Raymond*, in argument, lays it down as a clear position, that if a legatee of money releases the legacy, he is a good witness to the will. In *Hindeson v. Kersey* (*b*), the testator, by a will made in 1734, devised his lands to trustees, to dispose of the rents and profits to poor orphans, and aged and impotent people, within a particular township. The will was attested by two of the trustees, who, at the time of attestation, and of the testator's death, were seised of tenements in the township, for which they paid the poor-rate. Before the day of trial, they released their interest to the other trustees, and conveyed their tenements within the township to other persons. The majority of the Court were of opinion, that the will was duly attested to pass the real estate; but Lord *Camden* differed, and delivered an elaborate judgment in support of his opinion. The weight of authority, therefore, is in favour of the proposition, that a party having an interest at the time of attestation, but who discharges that interest previously to his examination, is to be considered a credible witness, within the meaning of the statute of frauds; and that being so, if *Thomas Hatfield*,

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(*a*) *Peere Will.* 557.(*b*) *4 Burn's Ecc. Law.* 97.

as the plaintiff does not claim under the attesting witness, he is entitled to an estate in fee simple in the lands in question.

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Reader, contrá. This will was not duly attested so as to pass the real estate, and, consequently, *Elizabeth Hatfield* took no estate in the devise to her; for *Thomas Hatfield* cannot be considered a credible witness within the meaning of the 29 Car. 2. c. 3. It is clear that he would not have been a competent witness to prove the will, during the lifetime of his wife, for he would have an interest in right of his wife, in the estate which she took under the will; they might have sold their interest in the estate, and the money arising out of such sale would have belonged to the husband. Besides, if *Mary Bell* had died in the lifetime of *Thomas* and *Elizabeth Hatfield*, he would have been seised during the life of his wife, and in case of surviving her, he would have been tenant by the courtesy; he would therefore have an interest in supporting the will, and could not be a competent or credible witness to prove it. The case of *Hilgard v. Jennings* (*a*) is an authority to shew that a devisee is not a good witness to a will under which he takes an interest. The decision in that case proceeded on the ground that the will was void, quoad the devise to him, because he took an interest under it, and *Holdfast dem. Austey v. Dowsing* (*b*) is an authority precisely in point to shew, that *Thomas Hatfield* was not a credible witness within the meaning of the statute. It is true that there are authorities to shew, that the competency

(a) *Cartew*, 514.

(b) 2 *Sr. 1255.*

also, that a husband and wife cannot, in any case be a witness for each other. *Davis v. Dimwoodly.* (a)

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Cockerill, in reply. The husband might have extinguished all his interest in the wife's estate, by releasing the rents and profits during his life, and he might, therefore, have made himself a competent witness to prove the will, immediately after the death of the testator.

The Court afterwards sent the following certificate.

This case has been argued before us; and we are of opinion, that the will of the said *John Steemson* was not duly executed, so as to pass any real estate in the messuage, garden, and premises to *Elizabeth Hatfield*.

C. ABBOTT.

G. S. HOLROYD.

W. D. BEST.

(a) 4 T. R. 678.

REX *against* WILLIAMS.Wednesday,
April 24th.

A Rule nisi had been obtained for filing a criminal information against the defendant for an alleged libel upon the clergy of the diocese of *Durham*. The publication stated, that upon the death of her late majesty, none of the bells in the several churches at *Durham* were tolled. It ascribed this omission to the clergy; and then proceeded to make some very severe observations on that body. The rule was obtained upon affidavits,

The Court will grant a criminal information for a libel upon a public body of men upon an affidavit, stating the publication of the libel by the defendant.

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stating the purchase of the newspaper containing the libel, and that the defendant was the proprietor or publisher of the paper.

Brougham and *Carter* now shewed cause, and urged that the Court would not grant a criminal information for a public libel, upon the application of an unknown private prosecutor, and without any affidavit of the charge being untrue.

Scarlett and *Tindal*, contra. The Court have, in many instances, granted informations for libels, on a number of individuals, without requiring any affidavit of the falsehood of the charge. In *Michaelmas*, 13 Geo. 2. 1739, such an information was granted against *M. Je-nour*, the printer of the *Daily Advertizer*, for publishing a libel against the Directors of the *East India Company*; and this application was supported by affidavits, stating the purchase of the newspaper, and an acknowledgment by the defendant that he had printed it. In *Hilary* term, 28 Geo. 2. 1755, a similar information was granted against *A. Alderton*, for writing and publishing a libel on the justices of the peace for the county of *Suffolk*, in an advertisement respecting the expenditure of money in the hands of the county treasurer. The only affidavit in support of the application was, that of the printer of the newspaper, that he had received the advertisement from the defendant for publication. So in *Hilary* term, 15 Geo. 3., such an information was granted against *R. Holloway* and *G. Allen*, for printing and publishing a libel upon the justices of the peace of the county of *Middlesex*, usually sitting by rotation in *Lichfield-street*, in a pamphlet entitled *The Rat-trap*,
charging

charging them with ignorance and corruption in the execution of their office. This rule was granted upon an affidavit, stating the purchase of the pamphlet from one of the defendants, and that the other acknowledged himself to be the author, and that several gentlemen named usually sat, by rotation, as justices at a public office in *Lichfield-street*. It is clear, too, from *Rex v. Osborn, 2 Barnardiston*, 138. 166. (a), that the Court will grant a criminal information for a libel reflecting on a public body.

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Rule absolute,

(a) See this case also in a note in *2 Swanst. Rep.* 503.

DIXON against REID.

Thursday,
April 25th

ACTION upon a policy of insurance on ship and cargo, at and from *Sierra Leone* to a port of discharge in *Great Britain*; 2000*l.* upon ship and 3000*l.* upon the cargo, valuing wood at 12*l.* per load. The plaintiff, on the trial of the cause, at the *London* sittings after last *Michaelmas* term, had obtained a verdict for a total loss by barratry, and the underwriters, upon a threat of execution, paid as for a total loss. A rule nisi had been obtained, calling on the plaintiff to shew cause why the underwriters should not be allowed the amount at which that part of the cargo which arrived in *London* had been valued by the policy, subject to the charges thereon, together with the sums paid out of the proceeds of the ship and cargo at *Barbadoes*; for wages, &c. and why so much as the said two sums should

Where a ship and cargo was barratrously taken out of her course by the crew, and the ship and part of the cargo sold, and the remainder sent home by another vessel: Held, that this was a total loss of the cargo from the time of the committing of the act of barratry.

1822.

Dixon
against
Reed.

amount to, should not be paid back by the assured to the underwriters, out of the money paid over to them, or why, in default thereof, the consolidation rule should not be opened and a further trial be had. The following facts now appeared upon the affidavits. The ship received on board, at *Sierra Leone*, 233 logs of timber, being about 260 loads, and sailed from thence on her voyage, on the 8th *March*, 1820, but was barratrously taken by the crew to *Barbadoes*, where she arrived on the 28th *April*, and the ship was condemned and sold, and 47 logs of timber were also sold, to pay the charges incurred there, and the remaining 186 logs were forwarded to *London* by another vessel, which arrived in *August*, 1820. The insured abandoned to the underwriters. Upon the arrival of the 186 logs in this country, the market price of timber being then 10*l.* or 11*l.* per load, the plaintiff proposed to settle the loss upon that part of the cargo at 69*l.* 9*s.* 6*d.* per cent. The underwriters not consenting to it at that time, the market price of timber afterwards fell, and the 186 logs were, on the 27th *April*, 1821, sold, (but not by the plaintiff,) at the rate of about 6*l.* per load; and the loss actually paid by the underwriters on the cargo, amounted to 98*l.* 12*s.* 6*d.* per cent.

Scarlett and *F. Pollock* now shewed cause. The question is, whether, upon the facts proved, this was to be considered a total loss, with benefit of salvage, or merely an average loss. If it was a loss of the latter description, the plaintiffs can only recover for the damage they have sustained by the loss of the 47 logs at *Barbadoes*. If, on the other hand, it be a total loss, with benefit of salvage, then the plaintiffs are entitled

to

to recover the sum which the underwriters have actually paid. They were then stopped by the Court.

1822.

 DIXON
against
REED

The Solicitor-General and *Fuller*, contra. This was only an average loss. It is quite clear, that if the ship had been driven out of her course by tempestuous weather to *Barbadoes*, and had been there condemned and sold, and a part of the cargo also sold, and the rest transhipped, and the voyage, as to the latter part, thereby retarded, that would have been only an average and not a total loss. *Glennie v. London Assurance Company.* (a) *Anderson v. Wallis.* (b) *Hunt v. The Royal Exchange Assurance Company.* (c) In the latter case it was expressly held, that a loss of voyage for the season by the perils of the sea, was not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average, where the cargo is in safety, and not of so perishable nature as to make the loss of the voyage a loss of the commodity. Now here, the commodity was not of a perishable nature; it was not deteriorated in value by any of the perils insured against, but merely by the fall of price, for which the underwriters are not liable. It can make no difference, whether the ship be retarded in her voyage by the perils of the sea, or by the barratry of the master or mariners; the underwriter having expressly insured against this description of peril.

ABBOTT C. J. I am of opinion, that this is a case of a total loss, with benefit of salvage. The case is plainly distinguishable from all the cases which have

(a) 2 M. & S. 571. (b) 2 M. & S. 240. (c) 5 M. & S. 47.

1822.

DIXON
against
REID.

been cited in argument, where the ship has been driven out of her course by the perils of the sea, and the voyage thereby retarded. In those cases, the cargo was, during the whole time, in the possession of the assured. Here by the fraud and barratry of the master and mariners, the cargo was taken out of the possession of the assured. From that time it became to them a total loss. The payment of the wages at *Barbadoes*, and the sending home the 186 logs, were not acts of the assured, or of any person authorised by them. I think, therefore, that this was a total and not an average loss, and, consequently, this rule must be discharged.

Rule discharged. (a)

(a) See *Falkner v. Ritchie*, 2 M. & S. 290. as to an insurance on ship.

*Friday,
April 26th.*

DYSON and Another against COLLICK.

The contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrong doer.

TRESPASS for breaking and entering part of a cut or watercourse, belonging to the plaintiffs, in the county of Sussex, and breaking down a dam of the plaintiffs, then being in and across the said part of the said cut or watercourse belonging to the plaintiffs, which cut or watercourse led from the *Lavant* through closes of meadow-land near to a certain cut or branch of a canal, which the plaintiffs were then making, under a contract made by them with the company of proprietors of the *Portsmouth* and *Arundel* Navigation, by virtue of an act of the 57 G. 3. for making a navigable canal from the river *Arun* unto *Chichester* harbour, and from thence to *Langstone* and *Portsmouth* harbours,

bours, with a cut or branch from *Hunston* common to the city of *Chichester*; by means of which said breaking down the said dam the water rushed and flowed with great force from the river *Lavant* unto the said cut or watercourse, and the said closes of meadow-land into the said cut or branch, so making or nearly completed, and forced a great quantity of the said closes or meadow-land into the said cut or branch, and broke down thirty yards of the said cut or branch, and filled up the same, which said quantity of soil, so forced into the said cut or branch, the plaintiffs, under their contract, were bound to remove. Plea, not guilty. At the trial, before *Wood* B. at the last assizes for the county of *Sussex*, the only question of law was, whether the plaintiffs had such an interest in the bank in question as to entitle them to maintain trespass. It appeared that the plaintiffs had entered into a contract with the company of proprietors of the *Portsmouth* and *Arundel* navigation for forming a canal; and, in the course of performing their contract, in making the branch from *Hunston* common, in *February*, 1821, had erected a dam upon the locus in quo by permission of the owner of the soil. The dam was six feet thick, and was twelve feet across, and was formed of earth and wooden piles. It had been originally made in *January*, 1821; between that time and *December* it had been repaired by the plaintiffs. A verdict having been found for the plaintiffs,

1822.

Direction
against
Colliec

Taddy Serjt. now moved for a rule nisi to enter a nonsuit, or for a new trial, and contended, that the plaintiffs had no such interest as to enable them to maintain trespass. They had constructed the dam on the

1822.

Dyson
against
Clarke.

the soil of another, and by his permission ; it was a continuation of the soil from one bank of the watercourse to another ; it consisted of earth which coalesced with the adjacent soil ; and the bank, therefore, became the property of the owner of the adjoining land. In *Callis on Sewers*, p. 74. fourth edition, it is laid down that “ A wall doth differ in point of ownership from a bank, first, in respect of the materials the same is made of : for a bank is made *ex solo et fundo quæ ex suis propriis naturis sunt eadem cum terra super qua edificatur* ; but so is not a wall, for it is an artificial edifice, not of the materials arising of the place where it standeth, but which he brought thither, and built there *ad propria onera et costagia partis* : so that the ownership and property of a wall doth appertain to him who is bound to repair the same, though his ground lie not next thereto ; but of a bank, the property and ownership is his whose grounds adjoin thereto.” And this was considered good law by the Court of Common Pleas in *The Duke of Newcastle v. Clarke* (a), where it was held, that the commissioners of sewers could not maintain an action against commissioners of a harbour for breaking down a dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them, on behalf of the public, does not vest in them such a property, or possessory-interest, as will enable them to maintain such action.

Per Curiam. The dam was erected by the plaintiffs at their own expense, and with their own materials, upon the locus in quo, with the consent of the owner of the

(a) 2 B. Moore, 666.

soil,

soil, for a special purpose. Until that purpose was completed, the plaintiffs were entitled to the possession of the dam. Now, it is perfectly clear that the person in possession of property, whether rightfully or wrongfully, may maintain trespass against a mere wrong-doer. Indeed, if they had any other than a partial or subordinate interest in the dam, trespass is the only proper remedy. This case is distinguishable from that of *The Duke of Newcastle v. Clarke*, for there the commissioners of sewers had no possession, but had a mere right to enter upon the locus in quo, and to do certain acts. In *Welch v. Nash* (a), the posts were put upon the lands of another without his permission; and yet it was held, that the party who put them there might recover in trespass for taking them away, where the general issue only was pleaded. Now, that could be only on the ground that the posts were the property of the plaintiff; for if they were not so, it would have been a good defence to the action.

1822.

DYSON
against
COLLICK.

Rule refused.

(a) 8 *Eas*, 394.

the mortgagee, who has the legal title vested in him. The former, therefore, is a tenant within the strictest definition of that word.

1822.

 PARTIALLY
against
BELL.

Rule refused. (a)

(a) As long as the mortgagor or his heir is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy between the parties; or otherwise the mortgagor or his heir must hold in fee, and as disseisors; for the law of England recognises no possession independent of a tenancy, either to the lord paramount or mesne lord: If, in the mortgage deed, there is the usual proviso for the enjoyment of the land by the mortgagor, and his heir, until default in payment, &c., and the mortgagor is in actual possession, he may, under the agreement, be regarded as *tenant for years* to the mortgagee, during the continuance of the agreement; *Powsley v. Blackman* (a); and on his death, during the agreement, his legal interest devolves on his *executors*, who, during the remainder of the agreement, are trustees for the heir of the mortgagor. If, in the case of such agreement, the money is not paid at the appointed time, and the mortgagor continues in possession after the determination of the agreement, without any fresh agreement between the parties, he is, until payment of interest, or other recognition of tenancy, tenant by sufferance, for he came in by a rightful title, although he holds over wrongfully. If the mortgage deed contains no such agreement, and the mortgagor remains the actual occupant with the consent of the mortgagee, he is strictly tenant at will. *Keech v. Hall*. (b) If, in the latter instance, the mortgage is transferred to another, without the concurrence of the mortgagor, the tenancy at will is determined, and the mortgagor becomes tenant, by sufferance, to the assignee, until payment of interest or other recognition of tenancy; and in all cases in which the mortgagor can be considered tenant at will, the death either of himself or of the mortgagee must determine the tenancy. If it is determined by the death of the latter, the mortgagor will be tenant, by sufferance, to the representative of the mortgagee, until payment of interest or other recognition of tenancy, and afterwards tenant at will. If it is determined by the death of the mortgagor, and his heir or devisee enter and hold without any recognition of the mortgagee's title by payment of interest or other act, an adverse possession may be considered to take place. Per *Holt* in *Smartle v. Williams*. (c) In every case in which a tenancy by sufferance exists between the parties, and even where an adverse possession commences, as by the entry of the heir or devisee of the

(a) *Cro. Jac. 659.*(b) *1 Doug. 22.*(c) *3 Lev. 387. & 1 Salk. 245. Thunder v. Belcher, 3 East, 449.*

CASES IN EASTER TERM

1822.

PARTNERS
against
BELL.

mortgagor without the consent of the mortgagee, the payment of interest is a recognition of the title of the mortgagee, and evidence of an agreement that the mortgagor, or person deriving title from him, shall hold at will, and a strict tenancy at will commences. *Holland v. Hatton.* (a) If the land is in the occupation of tenants, and the mortgagor is permitted to receive the rents, he has been considered to be a receiver for the mortgagee, *Moss v. Gallimore* (b), but without liability to account. *Coote's Law of Mortgages*, p. 327, 8.

(a) *Carth. 414. & 10 Vin. Ab. 418.* pl. 19.

(b) *1 Doug. 283.* Vide *Ex parte Wilson*, 2 Ves. & Bea. 252.

Saturday,
April 27th.

LAMPON the younger against CORKE.

A deed containing a general release of all debts, &c., recited that the releasee had previously agreed to pay to the releasor the sum of 40*l.* for the possession of certain premises, and that in "consideration of the said sum of 40*l.* being now so paid as hereinbefore is mentioned," and also in consideration of the sum of 10*s.* a piece, well and truly paid to the said releasor and J. S., the receipt of which said several

sums of money they did thereby acknowledge, did release, &c. There was also a receipt for the sum of 40*l.* indorsed on the release. But it appeared on action afterwards brought for this sum that, in fact, it had never been paid : Held, that this deed of release was no estoppel, inasmuch as the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the sum of 40*l.*

his

A SSUMPSIT against the defendant, as the maker of the following promissory note, dated *Edenbridge, April 11th, 1821*, "Two months after date I promise to pay Mr. *Thomas Lampon*, junior, or order, the sum of 40*l.*, value received this day, in things appraised by Mr. *Dowbell*, and in having possession given to me of the premises lately held under me by *Thomas Lampon*, senior, afterwards by the sheriff." The declaration contained, also, counts for goods sold and delivered, and the usual money counts. Plea, general issue. At the trial, at the last *London* sittings, before *Abbott C. J.*, it appeared, that the defendant was the landlord of certain premises occupied by the plaintiff's father, and that the plaintiff having taken possession of the premises, and the crops growing thereon, under a writ of execution against

his father, the defendant, in order to get possession of the premises and crops, gave the note in question, which, when originally signed by him, did not contain the words "or order." These words were inserted on the 14th *April*, 1821, without his knowledge. Under these circumstances, the Lord Chief Justice thought the count on the note could not be sustained, and the plaintiff then proceeded on the other counts in the declaration. The defendant, in answer to the plaintiff's case, put in a deed, executed by the plaintiff, dated 14th *April*, 1821, which recited that *Thomas Lampon* the elder, was in possession of certain Hereditaments and premises, as tenant to the defendant, but which tenancy would have expired on the 29th day of *September*, 1821, had it not been otherwise determined; and that the plaintiff had recovered a judgment against the said *Thomas Lampon* the elder, for the sum of 450*l.*, besides costs of suit; and thereupon all the estate, term, and interest of the said *Thomas Lampon* the elder, of and in the said hereditaments and premises, together with the crops growing thereon, were taken in execution, by virtue of a writ of fieri facias, and the warrant grounded thereon, at the suit of the plaintiff; and that the defendant, being desirous of obtaining possession of the premises, applied to, and prevailed on, the plaintiff, as such judgment-creditor, to give him possession of the same, which the plaintiff accordingly did, on the 11th day of *April*, instant, *he, the said defendant, having then agreed to pay unto the plaintiff the sum of 40*l.* for such possession;* and that the defendant had requested the said *Thomas Lampon* the elder and the plaintiff, to execute an assignment of all their estate, title, and interest in the said hereditaments, which they had agreed to do; and then proceeded

1822.

*LAMON
against
COKE.*

ment of the 40*l.*, to prove, by parol evidence, that it had not been so paid. *Rowntree v. Jacob* (*a*), *Co. Litt.* 512. The plaintiff's remedy, if he has any, is in equity; but at law the release is a good defence; for he has, in terms, distinctly admitted the receipt of the 40*l.*

1822.

*Lampon
against
Coake.*

ANSTRUT C. J. It appears to me, that in this case the release does not operate to prevent the plaintiff from recovering. The deed is, indeed, inaccurately worded; but the Court ought to give such an effect to it as may best consist with what appears to have been the manifest intention of the parties, and what may best conduce to the real justice of the case. In the recital it speaks, in the first place, of an agreement to pay, and not of the actual payment of the sum of 40*l.* And then the consideration for the release is stated in these words: "In consideration of the said sum of 40*l.* being now so paid to the said *Thomas Lampon* the younger, as hereinbefore is mentioned." These latter words shew, that the parties meant to refer to the former part of the deed, where it speaks of an agreement to pay this sum; and that we ought to read the whole sentence thus: "In consideration of the said sum of 40*l.* being now so agreed to be paid as aforesaid." If that were not so, this absurdity would follow; that the deed would recite an agreement to release in consideration of the payment of 40*l.*; and then would proceed to release the defendant from the payment of that very sum itself. We have been pressed with the difficulty arising out of the words immediately following; "the receipt of which said several sums of money they, the said *Lampon* the elder and plaintiff, admit, &c." But these may and do refer, most properly, to the payment of 10*s.* a-piece to those persons

(*a*) 2 *Tenn.* 144.

1822.

LAWSON
against
CORKE.

mentioned immediately before. And by so construing the deed, the whole becomes intelligible, and consistent with the justice of the case, and the obvious intention of the parties. I think, therefore, that the operation of this deed was not to release this sum, inasmuch as the release, though in general terms, must be controlled by the previous recital. The verdict is, therefore, right.

BAYLEY J. The true question is, whether there is any thing in this deed which clearly shews, that this sum of 40*l.* has been paid to the plaintiff, and that not by a security, but in money. It must necessarily be admitted, that this release would have been an answer equally to the action on the note, if the note had remained unaltered. Then, are the words so clear as to leave no doubt? It first recites, that the 40*l.* had been agreed to be paid. The recital does not go on to say, in addition to this, that the 40*l.* had been paid; but when we come to the operative part, we find it stated that, "in consideration of the sum of 40*l.* being now so paid, as hereinbefore is mentioned," &c. Now, the words "so paid," and "as hereinbefore is mentioned," obviously do not refer to a new payment, but to some former payment, mentioned in the deed. Then, if we look back, we find no actual payment there stated, but only an agreement to pay. The words of the deed, therefore, are ambiguous; and let us in to enquire, whether there was an actual payment or not. And, on the facts stated, there is no doubt as to that point. The Court is not, therefore, prevented from deciding according to what appears plainly the justice of the case; for although the note, as a security, is invalid; yet the debt for which it was given, not being paid, remains still due to the plaintiff.

HOLROYD J.

HOLROYD J. The plaintiff is entitled to our judgment, unless he is estopped, either by the deed of release or by the receipt indorsed on it. As to the latter, it is sufficient to observe, that, not being under seal, it cannot amount to an estoppel; but can only be evidence for the jury, capable of being rebutted by the other circumstances in the case. And, if so, then, as it is admitted that no such payment has actually been made, this receipt becomes of no importance. As to the deed, it seems to me to depend on the construction to be given to the words already referred to, "In consideration of the said sum of 40*l.* being now so paid, as hereinbefore is mentioned." If the deed had absolutely stated a payment, unaccompanied by such words of reference, the case would be very different. But, here, there are words of reference; and we must, therefore, look to the prior part of the deed, and there we find no statement of actual payment, but only of an agreement to pay. It seems to me, therefore, that this does not amount to an estoppel, so as to shut out the plaintiff from proof of the truth of the transaction. Estoppels are odious in the law, and, being so, they ought not to be allowed, unless they are very plainly and clearly made out. That is not the case in this deed; and, therefore, I think, it is no estoppel; and then the verdict is right.

BEST J. If a party give a general release, it will, undoubtedly, extend to all debts then due; and the passage cited from *Cb. Litt.* is to that effect. But that must be understood of a release without any previous recital, qualifying its operation. If there be introductory matter, that will qualify the general words of the release. That is the case here. It is quite clear, looking at the recital, what was the intention of these parties.

1822.

 LAMPOX
against
 CORKE.

Scarlett and Taunton, contra, relied on the investigation on the 17th November last, as taking the case out of the usual rule.

1822.

The King
against
Bisnor.

ABBOTT C. J. We do not by discharging this rule, shut the door to an enquiry, for a bill of indictment may still be preferred against the defendant. But if we were to admit this excuse, we should entirely frustrate the very useful rule to which we have been referred. Perhaps, if at the investigation all the magistrates present had concurred in directing such an application to be made, the case might be different; but that does not appear to be the case. The rule must be discharged.

The Court upon this objection, having refused to discharge the rule with costs, *Campbell* waived the objection and went into the merits.

Rule discharged with costs.

GARBUTT and Another *against* WATSON.

Friday,
April 26th.

A SSUMPSIT for the non-performance by the defendant of a special agreement, relating to the sale of 100 sacks of flour. Plea general issue. At the trial at the last assizes for the county of York before Bayley J., it appeared that the plaintiffs, who were millers near Hull, on the 22d October, 1821, made an agreement with the defendant, a corn merchant, for the sale of 100 sacks of flour, at 50s. per sack, to be got ready by the plaintiffs, to ship to the defendant's order free on board at Hull, within three weeks, to be paid for by a bill on London at two months date, on receipt of invoice.

There was no memorandum in writing of the contract,

Where there was a verbal contract by the plaintiffs, who were millers, for the sale of a quantity of flour, which, at the time, was not prepared, and in a state capable of immediate delivery: Held, that this was a contract for the sale of goods within 29 Car. 2. c. 3. s. 17.

corrected by *Rondeau v. Wyatt*. This was substantially a contract for the sale of flour, and it seems to me immaterial, whether the flour was at the time ground or not. The question is, whether this was a contract for goods, or for work and labour and materials found. I think it was the former, and if so, it falls within the statute of frauds.

1822.

—
GARRETT
against
WATSON.

HOLROYD J. I am of the same opinion. I cannot agree with the judgment of the Court in *Clayton v. Andrews*. This was a contract for the sale of goods, and therefore the verdict is right.

BEST J. concurred.

Rule refused.

CARTWRIGHT, Esq. against WRIGHT.

Saturday,
April 27th.

ACTION on the case for a libel. Plea general issue. At the trial at the Westminster sittings after last Hilary term before Abbott C. J., the libel given in evidence was contained in a book published respecting Mr. Cobbett by the defendant, called "The Book of Wonders," and was as follows: Many well intentioned persons have expressed their surprise, that the "Enlightener" should have been willing to accept of a seat in corruption's den, purchased with the bank notes of a man, whose "incapability and baseness" he had so powerfully exposed. To convince such persons, that this line of conduct was strictly patriotic, we have only to assure them, that in so doing, he was walking in the footsteps of that "Venerable Veteran," whose "Creed is the criterion of excellence," (see No. 195.) and who, in an

Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal.

1822.

*Crown
against
Warren.*

article of that creed, has laid it down as a maxim, that "we must, in fighting the enemy, not reject the use of even despicable and detestable men," *Cobbett*, v. 32. p. 82. The libel as set forth in the declaration omitted the words "(see No. 195.)" and the words "*Cobbett*, v. 32. p. 82." The Lord Chief Justice was of opinion, that this was a fatal variance, and the plaintiff was nonsuited. And now,

Denman moved for a new trial. The omission does not alter the sense, for the defendant asserts the libellous matter respecting the plaintiff; and the references do not alter that: they only shew that the defendant in speaking of the plaintiff, has adopted the language of another person. If so, *Tabart v. Tipper* (*a*) is an authority to shew, that the omission of that which does not alter the sense of the remainder is not fatal. He also referred to *Bell v. Byrne*. (*b*)

ABBOTT C. J. I thought at the trial, and I am still of the same opinion, that this was a fatal variance inasmuch as the meaning of the paragraph given in evidence materially differs from that set out in the declaration. Reading the declaration, I should understand the libel as meaning, that the defendant had himself made the assertions there stated respecting the plaintiff. But when the libel itself is produced, and I find from the reference there contained, that it is a paragraph intended to expose the conduct, not of the plaintiff, but of Mr. *Cobbett*, it then turns out, that in truth these assertions are made respecting the plaintiff, not by the defendant, but by Mr. *Cobbett*. The meaning, therefore,

(*a*) 1 *Camp. N. P. C.* 553.(*b*) 13 *Eas*, 554.

of the two paragraphs is different, and the nonsuit is right.

1822.

CARRIAGE
against
WILSON.

BAYLEY J. The case of *Tabart v. Tipper* establishes, that a mere omission in setting out part of a libel is not fatal, unless the sense of that which is set out is thereby varied. Here there are two omissions, and the sense is thereby altered. For that which appears by the declaration to be the defendant's observation, turns out when the omissions are supplied to be the assertion of Mr. Cobbett respecting the plaintiff: and that according to *Bell v. Byrne* is a fatal variance.

HOLROYD J. concurred.

Rule refused. (a)

(a) *Bent J.* was absent at Chambers.

FREEMAN and Another against The EAST INDIA Saturday,
April 27th.
Company.

TROVER for forty-two chests of Indigo. Pleas. The captain of a ship has no general issue. At the trial, before Abbott, C. J., at authority to sell the cargo, except in cases of absolute necessity, where in which were the property of the plaintiff, were the course of a voyage from shipped at Calcutta, on board the *Cerberus*, for England. India the ship was wrecked off the Cape of Good Hope, and some indigo, which was part of the cargo, was saved, and the same was then sold by public auction, by the authority of the captain, acting bona fide according to the best of his judgment for the benefit of all persons concerned; but the jury found that there was no absolute necessity for the sale. Held, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, the original owners were held entitled to recover its value.

the

1822.

FREEMAN
against
The EAST IN-
DIA Company.

the vessel was wrecked off the *Cape of Good Hope*, and the greater part of the cargo was lost; 252 chests of indigo, however, were saved; and it did not appear that any of them was materially damaged. The forty-two chests, which were the subject of the present action, were perfectly sound when they arrived in *England*. The indigo was sold by public auction at the *Cape of Good Hope*, being advertised as part of the cargo of the *Cerberus*, by order of the captain, who acted bona fide according to the best of his judgment, and with a view to the benefit of all parties concerned. The vendees afterwards shipped the same to *England*, and they were deposited in the warehouses of the *East India Company*. The action was brought to try the right to the property, the purchasers having indemnified the present defendants. The Lord Chief Justice was of opinion, that the captain of a ship was not justified in selling any part of his cargo, except in case of absolute necessity; and he left it to the jury to say, whether, under the circumstances, there was such a necessity. A verdict having been found for the plaintiffs,

The Solicitor-General now moved for a new trial, and contended, first, that the captain, under the circumstances, had authority to sell the cargo; and, secondly, that the sale having been in market overt, the property was thereby transferred to the vendee. It must be admitted that, though the captain is not the agent of the owners of the cargo, and that he is to be considered, as to them, a mere depositary and common carrier; yet, under special circumstances, the character of agent and supercargo is forced upon him by the general policy of the law. The law is so laid down by Lord *Stowell* in the

the case of the *Gratitudine*. (a) That learned Judge there states that, "in some cases, the captain must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, and in intermediate ports into which he may be compelled to enter;" and then he mentions, as instances in the prosecution of the voyage, the case of throwing parts of the cargo overboard at sea, and of ransom by the general maritime law; and afterwards he puts an instance, in which the master, while in an intermediate port, has the same authority forced upon him. The case put is that of a ship driven into port with a perishable cargo, where the master can hold no correspondence with the proprietor, and the vessel is unable to proceed, or requires repairs to enable her to proceed in time. The learned Judge says, "In such emergencies the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. What must be done? He must, in such case, exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted in argument, that he is not absolutely bound to tranship; he may not have the means of transhipment; but even if he has, he may act for the best in deciding to sell; if he acts unwisely in that decision, still the *foreign purchaser will be safe under his acts*: if he had not the means of transhipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish." Now, in this case, the ship was totally lost. It appeared at the trial, that, at the time when the sale took place, there was no other vessel at the *Cape of*

1822.

FREEMAN
against
The EAST IN-
DIA COMPANY.

(a) 3 Rob. Adm. Rep. 258.

1822.

FALKNER
 against
 The EAST IN-
 dia Company.

Good Hope, in which that part of the cargo which was saved could be transmitted to *England*. It is true, that vessels in their way to *England* were expected, and arrived within a few weeks. At all events, it was for the captain to exercise his judgment, bona fide, whether it was better to tranship or to sell. It is admitted, that he did in this case act honestly; and, according to the law as laid down by Lord *Stowell*, a foreign purchaser has a good title to the property. In the case of *Reid v. Darby* (a), the Court of *K. B.* were of opinion, that the captain has no right to sell a ship reported, upon survey, not to be seaworthy, if he could have repaired it, and continued the voyage. Indeed, if a captain is not at liberty, under any circumstances, to sell the cargo, it will be impossible to find purchasers for cargoes in case of wreck. How can the purchaser learn whether the captain has any special authority to sell the cargo? The true question, therefore, which should have been left to the jury, was, whether, in this case, the captain had acted bona fide according to the best of his judgment, in making the sale. But, secondly, this was a sale in market overt; and by the law of *Holland*, which prevails at the *Cape of Good Hope*, such a sale transfers the property to a vendee; and for this he cited *Van Leeuwen's Commentaries on the Roman Dutch Law*, p. 400.

ABBOTT C. J. The case of the *Gratitudine*, which has been cited, was one where there was an hypothecation of the cargo by the master, for the purpose of enabling the ship to go on with her voyage. But here the case was quite different, for the vessel having been wrecked, the object of the voyage was entirely at an

(a) 10 *Eas.*, 143.

end;

end; and, under these circumstances, a sale of the cargo, or any part of it by the master, could confer no title on the purchaser, unless there was an apparent necessity for such sale. That question I left to the jury, and they were clearly of opinion, that there was, in this case, no such apparent necessity. I also told them, that if the master was not authorised to sell, the purchaser could not acquire any title, unless by a sale in market overt, and then only where he was not acquainted with the circumstances under which the sale was made; but, upon the evidence in this case, it appeared that he was fully acquainted with them. If I was wrong in so leaving the case to the jury, there ought to be a rule granted. But I am still of the same opinion.

1822.

FARRELL
against
The East India Company,

BAYLEY J. I think the case was properly left to the jury, and that there ought to be no rule granted. The case depends on the extent of the authority which the master has over the cargo. It is a question of considerable importance, but, as it seems to me, not of any great difficulty. The master has a clear right, by the general marine law, to hypothecate either ship or cargo, for the purpose of continuing the voyage; but beyond that, he has no power, except in a case of absolute necessity. There may be, indeed, cases in which hypothecation would be useless and absurd. Suppose the ship were wrecked, and her materials alone were saved; or that the cargo was saved, being perishable, and there were no means of transhipment; in such cases, an absolute necessity for sale would exist, and thereby the master would be forced to become the agent of the owners, for the purposes of sale; but otherwise, he would only possess the right of hypothecation. The rule laid down by Holt C. J., in

have such an authority, are where there is an absolute necessity for it, as in the case of a wreck, without power of transhipment, or where it becomes necessary to sell part of the cargo, for the purpose of enabling him to prosecute the voyage.

1822.

FREEMAN
against
The EAST IN-
DIA Company.

BEST J. A carrier by sea and a carrier by land stand precisely in the same relation to the owner of the goods that are to be carried. Their duty is, to convey the goods to the place of their destination, and their authority, with respect to the goods, is such only as is necessary for the performance of this duty. In a sea-voyage difficulties often occur, from which journeys by land are exempt. The authority of the master of a vessel must increase, in proportion to the difficulties that he has to encounter. If a storm or an accident disables the ship from proceeding on her voyage, and the master finds himself in a country where money can only be procured to pay for her repairs, by sale of part of the cargo, the necessity of his crew, as Lord Stowell has expressed it in the *Gratitudine*, forces upon him an authority to sell. So, if the ship be incapable of repair in a foreign port, and the cargo be perishable, or no place can be got to secure it in, although the voyage be at an end, it would be better for the owner of the cargo that it should be sold than left to perish, and the master might in such case sell the whole. The purchaser, knowing that necessity alone can justify the sale, and give him a title to what he purchases, will assure himself that there is a real necessity for the sale before he makes the purchase; and caution on his part will prevent (what has too frequently happened) the fraudulent sales of ships and cargoes in foreign ports. One of the

principal

1822.

WINN against INGILBY, Bart. and HAUXWELL. *Saturday, April 27th.*

TRESPASS for breaking and entering plaintiff's house, and taking his fixtures, goods, and chattels. Justification under a writ of *fi. fa.* directed to the defendant, *Ingilby*, as sheriff of the county, under which the defendant, *Hauxwell*, his bailiff, peaceably entered the premises, and seized, &c. Replication de injuria, &c. At the trial at the last assizes for *Yorkshire*, before *Cross Serjt.*, the only question was, whether the defendants were justified in seizing, under the execution, some fixtures, consisting of set pots, ovens, and ranges. It appeared that the house where these were fixed was built on the plaintiff's own freehold, and the learned serjeant was of opinion, that under these circumstances they were not seizable by the sheriff under an execution. The plaintiff accordingly had a verdict. And, now,

Littledale moved to enter a verdict for the defendants. In *Pool's* case (*a*), it was held that the sheriff might take in execution vats, coppers, &c. which had been put up by a soap-boiler in order to carry on his trade; and whatever the tenant, as between himself and the landlord may remove, the sheriff may seize. He referred also to *Elwes v. Maw* (*b*), and *Ex parte Quincy*. (*c*)

Per Curiam. The verdict is right, for these were fixtures which would go to the heir, and not to the

(*a*) 1 *Solv.* 368.

(*b*) 3 *East.* 88.

(*c*) 1 *Akt.* 477.

ejectment could not be maintained. The learned Judge was of opinion that the defendant's husband having been admitted under Sir E. Nepean, she could not be allowed to dispute the lord's title. The lessor of the plaintiff, therefore, had a verdict. And now,

1822.
—
Dox dem.
NEPEAN
against
BUNNIES

Adam moved for a new trial, and contended, that the title of the defendant really depended on the surrender and admission in 1794, and that the admission in 1808 was only in the nature of an attornment, in which case, according to *Rogers v. Pitcher* (a), the tenant may still dispute the landlord's title. The act of admittance by the lord is merely ministerial, and no interest passes from him to the tenant. How then can the admittance be taken to estop the tenant from disputing the lord's title?

Per Curiam. The evidence was properly rejected. When the party under whom the defendant claims title was admitted, in 1808, he did fealty, and acknowledged himself tenant to Sir E. Nepean, and she cannot now be permitted to dispute his title to the manor. It is not suggested that the legal estate has been altered since 1808. In the case referred to, the tenant, notwithstanding attornment, is allowed to set up the *ius tertii*, where it appears that he is co-operating with that third person. But here the defendant claims to set up the title of a person whose name the plaintiff would have been entitled to use in the ejectment.

Rule refused.

(a) 1 Taunt. 202.

make livery, because it is neither by the four or three jointly, nor any of them severally." Here, the power is to fifteen jointly or severally, and it is neither executed by the whole jointly, nor by one of them severally. The latter words, "or any of them," only apply to the persons who are to exercise the discretion, but they have no reference to the authority itself.

1822.

*GUTHRIE
against
AMMAGAONA.*

ABBOTT C. J. The law undoubtedly is as stated by Mr. *Williams*, but we are not disposed to extend the rule further. Whenever a case exactly similar to those cited shall occur, the Court will feel itself bound by them. But in this case we ought to look at the whole instrument: and if we do so, there is no doubt what the meaning of it is. Here, a power is given to fifteen persons jointly and severally to execute such policies as they or any of them shall jointly or severally think proper. The true construction of this is, as it seems to me, that the power is given to all or any of them to sign such policies, as all or any of them should think proper. The argument is, that the latter words only apply to the persons who are to exercise the discretion. That would have been quite correct, if those had been different from the persons entrusted with the power. But they are the same; these latter words, therefore, control the meaning of the former, and the verdict is right.

Rule refused.

the defendant, with liberty to the plaintiff to move to enter a verdict with nominal damages.

1822.

 RIVERS
against
GRIFFITHS.

Campbell now moved accordingly, and contended, that the issue was proved by the fact of the plaintiff's having demanded the larger sum, and that the maxim *omne maius continet in se minus* applied. In *Wade's case* (*a*) it was resolved, that if a man tenders more than he ought to pay, it is good, for the other ought to accept so much of it as is due to him. *Douglas v. Patrick* is an authority to the same effect. Now, in this respect (*b*), there is no distinction between a demand and a tender. The sum of 4*l.* 7*s.* 6*d.* tendered, and alleged to have been previously demanded, must be taken to be part of the 10*l.* 4*s.* for which the bill was given; and the whole of the larger sum having been previously demanded, each and every part of it was demanded, and therefore there had been a prior demand of the said sum of 4*l.* 7*s.* 6*d.*

Per Curiam. The issue is on the specific fact, whether the plaintiff did or did not, before the tender of 4*l.* 7*s.* 6*d.*, demand that very sum of the defendant. The proof is, that he demanded 10*l.* 4*s.* That proof does not support the issue. If the smaller sum only had been demanded, the defendant might have paid it. He did, in fact, pay 7*l.* on the following day.

Rule refused.

(*a*) *5 Rep.* 115. *a.*

(*b*) *3 T. R.* 685.

(*c*) See *Spybey v. Hide*, 1 *Campb.* 181.

delivery on board the ship under the above circumstances, and that it was the duty of the defendant to have signed the receipt tendered to him, and not to have signed the bills of lading until that receipt had been handed over by the plaintiff to *E. and S.*, and by the latter to him. The plaintiff accordingly had a verdict. And now,

1822.

RUCK
against
HARRISON.

Gurney moved for a new trial. The contract speaks of the goods being delivered free on board, which shows that the ship must be considered as the warehouse of *E. and S.*, and that the transitus was at an end by the delivery there. Here, too, a bill for the amount was drawn by the plaintiff, and the invoice of the goods delivered on the 2d of *August*. At that time, therefore, the transitus was at all events at an end. Here, too, *E. and S.* are the consignors of the goods. In *Craven v. Ryder* (*a*), the master had signed a receipt when the goods were put on board. Here he did not do so, and though he ought to have done so, perhaps on the 30th of *July*, the plaintiff's conduct on the 2d of *August* was a waiver of it. That case is, therefore, distinguishable materially from the present.

ABBOTT C. J. If the delivery on board the vessel to *E. and S.* had ever been completed, the transitus would have been at an end. But when it was made at first, it was accompanied by the demand of a receipt from the mate who represented the defendant. Now, it was important for the plaintiff to have that receipt, for so long as he retained possession of it, he was enabled to

(a) 2 *Marsh.* 127. 6 *Tenn.* 423. *S.C.* ;

indicted, the said plaintiff, for wilful and corrupt perjury, &c. Plea, general issue. At the trial, at the last *Guildhall* sittings, before *Abbott C. J.*, the plaintiff obtained a verdict, damages 150*l.* And now,

1822.

 PLEA
against
HEARN.

Platt moved to arrest the judgment. Both counts are defective. By the first it appears, that the alleged perjury was committed coram non judice; for the writ of enquiry was issued out of the King's Bench, and made returnable in the Common Pleas. The Secondary had, therefore, no jurisdiction to administer the oath. The second count is too general. The indictment must be set out, and here it is only stated, that the defendant maliciously indicted the plaintiff for wilful and corrupt perjury. In *Com. Dig.* tit. *Action on the case for a conspiracy*, C. 4., it is laid down, that the declaration must shew a good indictment, otherwise he cannot be lawfully acquitted; and *Sherington v. Ward* (a) is also in point. It would be bad to say, that the defendant maliciously indicted the plaintiff for felony; for, by such a general statement, the defendant cannot know what the charge against him is.

Per Curiam. There may be a distinction between the cases put of felony and perjury; the former may embrace a variety of charges, but perjury is one distinct species of crime. But, at all events, this count is sufficient after verdict. As to the first count, that is also good; for we are of opinion, that, where a man maliciously prefers an indictment against another for a crime, he is liable to an action for it, although the indictment be defective; for, in either case, whether the

(a) *Cro. Elk. 724.*

indictment

stock of cattle, and all and every his implements of husbandry ware, whatsoever and wheresoever unto him belonging, together with all the money he might happen to have by him, or out upon interest, and book-debts, and wearing apparel, together with all the rest, residue, and remainder of his real and personal estate whatsoever and wheresoever unto him belonging in the kingdom of *Great Britain*, or elsewhere, he gave and devised the same unto his two grandsons, *William Clayton*, *David Shaw Clayton*, and his grand-daughter, *Elizabeth Clayton*, their several respective heirs and assigns for ever, upon trust nevertheless, and to and for the several uses, intents, and purposes thereafter expressed concerning the same; and then the will proceeded with these words: "and upon trust that my trustees, or the survivors of them, their heirs, or assigns, shall, immediately after my decease, take an inventory of all my household goods and furniture, stock of cattle, hay, corn, and husbandry ware, together with all the money I may have by me, or out upon interest, at the time of my decease, together with my book-debts, and all other my personal estate whatsoever, and pay out of the same all my just debts, funeral expenses, the probate of this my will, and all other unavoidable charges concerning the same, and all upon trust that my trustees, or the survivor of them, their heirs or assigns, shall pay unto my daughter-in-law, *Catherine Clayton*, the mother of my trustees, yearly and every year during the time and term of her natural life, all the interest that may arise and become due of and from the sum of 500*l.*, which I have now down upon interest upon the turnpike-road from *London* through *Buxton* to *Manchester*; And also upon trust,
that

1822.

CLAYTON
against
LOWE.

William Clayton, David Shaw Clayton, and Elizabeth Clayton, the plaintiffs, entered into, and still are in possession of the said one undivided eighth part of the messuages or tenements and close of land situate at *Haughton* and *Denton*, in the county of *Lancaster*, and known by the name of the *Broom Stair* estate, and all the estates therein devised. *Catherine Clayton*, the daughter-in-law of the testator, is still living. *William Clayton* was, at the death of the testator, his heir at law, and is still living. The question for the opinion of the Court was, what estate or interest *William Clayton, David Shaw Clayton, and Betty Clayton*, took or were entitled to under the said will of the testator *William Clayton*, in one-eighth part or share of the messuage or tenement and closes of land situate at *Haughton* and *Denton*, in the county of *Lancaster*, and known by the name of the *Broom Staire* state. This case was argued in last term by

1822.

CLAYTON
against
LOWE.

Sugden, for the plaintiffs. In this case the plaintiffs took a fee simple in the 8th share of the *Broom Stair* estate. This was a devise of both real and personal property, whatsoever and wheresoever, to be equally divided between his grandchildren, share and share alike for ever. These words are sufficient to carry a fee, and admit of no doubt. But then follow the gifts over, viz. that in case any of his grandchildren die and leave no children, then the share of such grandchild should be equally divided amongst the surviving brothers or sister, share and share alike, and in case they died, leaving children, then the share to be divided amongst those children, share and share alike. He seems, therefore, to have contemplated the estate, going over

in

ber (a), are also authorities in point. There the courts have held in furtherance of the intention of the testators, that the devises over were good by way of executory devise. Here too, the first devise is not to take place till after the death of *Catherine Clayton*. The testator might therefore mean, that the devise over should be in case any of his children should die, leaving no issue at the time of the death of *Catherine Clayton*. In that case, the limitations over would be good by way of executory devise. But, whether this be so or not, in either case, the plaintiffs cannot make a good title to the estate.

1822.

 CLAYTON
against
LOWE.

Sugden in reply. The cases cited are not applicable to the present. In all of them, the question was, whether the devise over was so tied down to a particular event and particular period, as to make the limitation over, good as an executory devise, or whether the devise over was general, and so cut down the prior estate in fee into an estate tail. But here it is very different, in the case of an executory devise, the fee is left to the first devisee except in one particular event. Here, it is to go over in all possible contingencies. Unless, therefore, the first devise be of an estate for life, nothing can be made of the will. If then it be once admitted, that by the first devise, if alone, a fee would pass, there is an end of the case. As to the devise to *Catherine Clayton*, it is only of an annuity arising out of a particular sum of money secured on a particular road. It is impossible that the beneficial interest as to the other property, could be intended to be postponed till

(a) 1 B. & A. 713.

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be a petition, addressed to Lord *Palmerston*, the secretary at war, inclosing two bills of exchange, drawn by one *Wright* upon the plaintiff, by the description of *W. Fairman*, No. 6. *Surrey-street, Strand*, payable three months after date to the drawer's order, and by plaintiff accepted, payable at *Austen, Maund, and Co.'s*, and inclosing a certain writing annexed to the copy of the bill: "Answer at *Austen, Maund, and Co.'s*; lest no orders about the bill. Answer at No. 6. *Surrey-street*, that *W. B. Fairman* did not reside there, and that there were no orders to pay the bills." The declaration then set out the libel, which was as follows: "Your petitioner solicits your lordship's well-known justice and disposition to benevolence to be extended towards him, by directing an officer in his majesty's service, Captain *W. B. Fairman*, to discharge a debt which has been due to your petitioner above four years, and although frequently applied for, has never been noticed by Captain *Fairman*, but unjustly and unfairly he has deprived your petitioner of any redress, except through your lordship's humane consideration, by giving an address, as will appear by the inclosed, where he had no credit, nor even was known. Your petitioner begs most humbly to inclose copies of two bills of exchange, one for 100*l.* and the other for 75*l.* 10*s.*, which your petitioner received in payment as money, and, when due, Captain *Fairman* had given no order to pay them, either at his agent's or at the address of his bills, where your petitioner was informed he did not reside, nor did they know any thing about his bills. Since that period your petitioner has repeatedly written to Captain *Fairman*, who, although he has received the letters, has never noticed them, and has concealed himself from a

1822.

 FAIRMAN
against
I^me

bonâ fide for the purpose of obtaining redress, and not for the purpose of slandering the plaintiff.

1822.

 FAIRMAN
against
LVER.

HOLROYD J. (a) I think the direction given by my Lord Chief Justice to the jury was perfectly right. In the case of *Cleaver v. Sarraude* (b), which was tried at York, it was expressly held, that no action was maintainable for matter contained in a written communication made bonâ fide to a friend, and not for the purpose of slandering. The two cases are not exactly similar. The case cited rather resembles that of a bad character, given by a master of his servant. There, unless it be maliciously done, the communication is considered privileged by the occasion on which it is made. So, in the case of a confidential communication made between friends, to prevent an injury, and not for the purpose of slandering, the occasion justifies the act. If the communication be made maliciously, the case would be otherwise; and the falsehood of the facts stated might, in some cases, be evidence of malice. In the case of words spoken by a barrister (c), in a course of a cause, it may not be, perhaps, sufficient to allege and shew even that the words are false and malicious, without also alleging and shewing that they were uttered without reasonable or probable cause. The truth, indeed, of the facts, which form the subject-matter of the slander, generally speaking, can only be given in evidence when specially pleaded; but in that case the speaking or publishing of the slander is not justified by the mere occasion on which it is spoken or published, but because it is

(a) Bayley J. had left the court.

(b) *Cleaver v. Sarraude*, cited in 1 Campb. 268.

(c) See note (b) in *Hodgson v. Scarlett*, 1 B. & A. 245.

contains such expressions as an angry man was likely to use, and such as would have rendered the letter a libel if it had been sent into general circulation, or to any individual, without a sufficient cause to justify the sending of it. But the circumstances under which this letter was sent rendered it a privileged communication. It was an application for the redress of a grievance, made to one of the king's ministers, who, as the defendant honestly thought, had authority to afford him redress. And this may be done without hazard of an action or prosecution, if the application be made bona fide with a view to obtain redress for some injury received, or to prevent or punish some public abuse. In the case of *The King v. Bayley* (*a*), a letter addressed to General Willes and the four principal officers of the Guards, to be by them presented to the king, stating that the prosecutor had obtained from the defendant a warrant for the payment of money due to him from government, under a promise of paying the defendant such money, and that the prosecutor had received the money, and had not paid it over to the defendant; was held to be no libel, but a representation of an injury, drawn up in a proper way for redress. That case is like the present. Neither the officers nor the king could give the defendant direct assistance in receiving the money wrongfully withheld. But the king had authority to dismiss an officer from his service, and most probably would dismiss any one who hesitated to do what honour and justice required. In the present case, there was, at least, probable cause for thinking that the secretary at war would advise his majesty, that the plaintiff was not

1822.

FAIRMAN
against
Ives.(*a*) 3 Bacon's Abr. tit. *Libel*, A. 2.

1822.

HAMILTON *against* STOW.*Friday,*
May 3d.

TRESPASS for seizing and taking plaintiff's telescope. Plea, first, not guilty; secondly, justifying the seizure, as the collector of the rates and duties payable at the harbour of *Dover*, in respect of a duty of three-pence per ton, payable by the plaintiff as the master of a ship called *The Lord Duncan*. Replication, that the said ship, at the time she came into the harbour of *Dover*, as in the plea mentioned, and from thence until at the said time, when, &c. was employed in the service of his majesty. Rejoinder, that the said ship was not employed in the service of his majesty, as alleged in the replication; upon this issue was joined. The cause was tried at the Kent summer assizes, 1820, and the jury found a special verdict; which stated the following facts: The vessel upon which the rate of 3*d.* per ton was demanded, was a packet called *The Lord Duncan*, and was, at the time of the committing of the trespasses, employed in the service of his majesty in carrying the public mails of letters and dispatches of his majesty's government from *Dover* to *Calais* and *Ostend*, and in bringing back letters and dispatches of his majesty's government from *Calais* and *Ostend* to *Dover*. At the time of the committing of the trespass, the plaintiff was the commander of the vessel, and was so appointed in the year 1807 by the post-masters general; it appeared by the appointment, that he was appointed to be the commander of *The Lord Duncan* packet boat, employed by the post office,

An act of parliament, imposing a tonnage duty on vessels coming into the harbour of *Dover*, contained an exception of all vessels employed in his majesty's service: Held, that a vessel hired by the post-masters-general to carry the mails and government dispatches to and from *Dover* to *Calais*, &c., the master of which was permitted to carry passengers and their luggage, and bullion, upon freight, is a vessel coming within the exception.

Bolland, for the plaintiff, contended that this vessel, at the time of the trespass, was in his majesty's service within the meaning of the 47 G. 3. c. 69. s. 5., by which it was provided, that the act should not be extended to charge any vessels belonging to his majesty, or that shall or may be employed in his service, with any of the rates or duties to be imposed by the act.

1822.

Hamilton
against
Snow.

Chitty, contra. This vessel was the private property of the master, and he would have been liable to contribute to the poor-rate in respect of his beneficial occupation of it. *Rex v. Jones.* (a) In that case, the appointment was nearly in the same terms. The exemption contained in the 47 G. 3. c. 69. is one to which the crown would be entitled. Here, too, the employment by the crown was partial; for the master might carry goods of a particular description; and, therefore, as to all purposes, except that of carrying the letters and public dispatches, the vessel was not in the employ of government.

ABBOTT C. J. The statute contains two exemptions; first, all vessels belonging to his majesty; and, secondly, all vessels employed in his service. The case of *Rex v. Jones* is a good authority to shew, that the vessel, in this case, belonged to the captain, and not to the king; but it does not apply to the latter branch of exemption. It is impossible to say that this vessel was not employed in his majesty's service, when it came into *Dover*. The captain is appointed by the post-master general. The appointment of the captain states the vessel to be em-

(a) 8 East, 451.

disposed thereof to his own use. The defendant pleaded to the two first counts the general issue, and demurred specially to the last count.

1822.

 ORTON
against
BUTLER.

E. Alderson, in support of the demurrer. A similar question to the present came before the Court in *Samuel v. Judin in Error*. (a) There the ground of the demurrer was the misjoinder of a count like the present, with other counts framed in tort, and though the courts of Common Pleas and King's Bench both held that the objection was not sufficient, yet the judges seemed to intimate strongly, that the count, if particularly demurred to, would be bad. This is in fact, a count for money had and received, framed in tort. And if this be allowed, there will no longer be any distinction between case and assumpsit. The consequences of this will be productive of great inconvenience. A party may be thereby deprived of his plea in abatement, and his set off may be defeated by so framing the count. For the statutes of set off speak only of mutual debts. So again, if a cause of action be within the jurisdiction of an inferior court, as for instance, the London Court of Requests, and the plaintiff recovers under 5*l.* damages, he may, by framing his count in the present mode, defeat the act, which would otherwise deprive him of his costs. For the statute 3 *Jac.* 1. c. 15. s. 4. is expressly confined to actions of debt, or upon the case in assumpsit.

Tindal, contra. This is substantially a count in trover. There is a delivery of money to the defendant,

(a) 6 *E. 335. 1 New R. 43. S. C.*

or silver, and in that case a defendant can only redeem himself by tendering to the plaintiff the same specific pieces. But in this case he clearly might do so, by returning an equal sum of money. There is, therefore, not merely a want of certainty in the count, but it states that which is not the subject of an action of trover at all. The demurrer, therefore, must be allowed.

1822.

ORTON
against
BUTLER.

BAYLEY J. I think we ought not to accede to the innovation attempted in the present case. The statute of *Westminster* gave the action on the case, where there was previously no proper form in the register, and from *Slade's* case (a) to the present time, the remedy for money had and received has been either by an action of assumpsit or debt. The question is now, whether the plaintiff can form a third; if we were to allow that, the provisions made in many instances by different acts of parliament would be evaded, and the instance to which we have been referred of the statute 3 *Jac.* 1. c. 15. s. 4., shews strongly the inconvenience that would result from such a decision.

HOLROYD J. I am of the same opinion. It is admitted, that this is not in point of form well framed in trover, but it is argued that it is so in effect. But I cannot agree with that argument; no part of the count alleges the money had and received, to have been previously the plaintiff's property, or in his possession, and consistently with it, the defendant might have received the money from a third person. And there is nothing stated in the count to shew, that the plaintiff

(a) 4 *Rep.* 92.

had

1822.

MURRAY *against* ELLISTON.*Friday,*
May 5d.

THE Lord Chancellor sent the following case for the opinion of this Court. In 1820, Lord *Byron* wrote a book intitled *Marino Faliero*, Doge of *Venice*, an historical tragedy, in five acts, with notes; and by deed, dated *April* 14th, 1821, he assigned the said tragedy and poem, and the copy-right thereof, and the exclusive right of printing and publishing the same, and all benefit and advantage thereof, to the plaintiff, in consideration of the sum of 1050*l.*, which was duly paid. The plaintiff caused the tragedy to be printed; and, on the 21st *April*, 1821, copies of it were, for the first time, printed and published for sale, for the sole benefit of the plaintiff. The defendant, being the manager of the theatre royal, *Drury-lane*, after the publication of the tragedy, printed and exposed to view, at the entrance to the theatre, and at divers other places, in the most conspicuous parts of *London* and *Westminster*, a bill of the performances at the theatre, dated 24th *April*, 1821, in which was contained the following notice: "Those who have perused *Marino Faliero* will have anticipated the necessity of considerable curtailments; aware that conversations or soliloquies, however beautiful and interesting in the closet, will frequently tire in public recital. This intimation is due to the ardent admirers of Lord *Byron*'s eminent talents, and will, it is presumed, be a sufficient apology for the great freedom used in the representation of this tragedy on the stage of *Drury-lane* theatre." And at the foot of the

The manager
of a theatre
having pub-
licly represented
for profit, a
tragedy, altered
and abridged
for the stage,
without the
consent of the
owner of the
copyright, is
not liable to an
action, although
the tragedy
had been previ-
ously printed
and published
for sale.

jured. Unfair and malicious criticism is another, and for that an action will lie. *Carr v. Hood.* (a) Suppose this play failed of success when represented, the sale of the work would thereby be damaged. Besides, the curiosity of the public would be thereby satisfied, and so the plaintiff would be injured in the sale of the work. And, whether that right of property arises from the common law, or from the statutes relative to it, is in this case immaterial. For, if the statute makes a literary work property, the common law will give the remedy for the invasion of it. The only question is, whether the representation of this piece for profit may not injure the copy-right. If so, the plaintiff is entitled to the judgment of the Court.

1822.

 MURRAY
against
EARLTON.

Adolphus, contra. In *Donaldson v. Beckett* (b), the majority of the Judges were of opinion, that the action at common law was taken away by 8 Anne, c. 19., and that the author was precluded from every remedy, except on the statute and on the terms and conditions prescribed thereby. The claim by the plaintiff on this occasion is at variance with this decision. For here, he contends for a far more comprehensive security, and one coexisting with that given by the statute, and restraining the public in points of which the statute takes no notice. The case of *Macklin v. Richardson* (c) was very different. There the farce of *Love à-la-Mode* had never been published, and the defendant having employed a short-hand writer to take it from the mouths of the actors, published it, and it was held that he could not do so. But when,

(a) 1 Comp. 355. (b) 4 Burr. 2408. (c) 4 M. & S. 694.

The following certificate was afterwards sent :

We have heard this case argued by counsel, and are of opinion, that an action cannot be maintained by the plaintiff against the defendant for publicly acting and representing the said tragedy, abridged in manner aforesaid, at the theatre-royal *Drury Lane*, for profit.

1822.

MURRAY
against
ELLISTON,

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

ROBINSON *against* ELSAM.

THE plaintiff, an attorney, had, on the 19th *March*, 1821, delivered to the defendant his bill for business done, amounting to 521*l.* 1*s.* 3*d.* On the 21st *April* the plaintiff arrested and held the defendant to bail for 500*l.* and upwards, and declared in the action. On the 14th *May*, a Judge's order was obtained for referring the bill of costs to the Master, to be taxed, upon the defendant's undertaking to pay the amount that should appear due on the taxation, and the costs of the action, the defendant being at liberty to deduct any payments made on account. The Master taxed the bill at 299*l.* 16*s.* 6*d.*; and, after giving the defendant credit for 15*l.*, there remained a balance due to plaintiff of 284*l.* 16*s.* 6*d.*; and the costs of the action to recover the bill were then taxed at 13*l.* 15*s.* 7*d.* The plaintiff having demanded payment of the whole sum, without giving the defendant credit for a cross demand which he had against the plaintiff, the former did not pay the amount, and on the 9th *November* he was taken upon an attachment for non-payment of the money, and conveyed to *Dover*

An attorney brought his action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing : Held, that this was a case within the 43 Geo. 3. c. 46. s. 3.; and that if not within the statute, still the Court, in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances.

Marryat now shewed cause. It must be now taken for granted, after the report of the Master, that the plaintiff had not any reasonable or probable cause for holding the defendant to special bail for the amount of 500*l.* The plaintiff has not recovered the amount of the sum for which the defendant was arrested and held to special bail, and, therefore, this case falls within the very words of the 43 Geo. 3. c. 46. s. 3. It is true, that the amount was not recovered by verdict, but that is not necessary; for where the amount of the debt was ascertained by the award of an arbitrator, it was held to be a sum recovered within the meaning of the act. (a) In this case the only mode of ascertaining the amount due was by taxation.

1822.

 ROBINSON
against
ELSAM.

Scarlett. The statute only applies to those cases where the amount recovered is ascertained by verdict. *Cammack v. Gregory* (b) and *Rouveroy v. Alfson*. (c) In the case cited from *Tidd's Practice*, a verdict was taken, subject to an award, and when the award was made, the verdict was entered accordingly; so that the sum ultimately recovered might be considered as recovered by verdict. Here the sum is recovered by the Master's allocatur. At all events, the defendant is too late in his application. He ought to have applied before the costs were paid.

ABBOTT C. J. We must now assume, after what the Master has done, that the plaintiff had not any reasonable or probable cause for holding the defendant

(a) *Tidd's Pr.* 1018. 6th ed. cites *Neale v. Porter. K. B.* 44 Geo. 3.

(b) 10 *East*, 525.

(c) 13 *East*, 90.

1829.

The KING *against* WILLIAM CLARKE.*Saturday,
May 4th.*

INDICTMENT against defendant, a constable within the city of *Bath*, for not obeying an order of the sessions of the county of *Somerset*, requiring him, as such constable, to issue out his warrant to the overseers of the poor of the parish of *St. James*, in that city, directing them to collect and levy the sum of 6*l.* for the purposes of the county-rate. Plea, not guilty. At the trial, before *Holroyd J.*, at the last *Dorsetshire* assizes, a verdict was found for the crown, subject to the opinion of this Court upon a case which stated, that the city of *Bath* was an ancient city, and had in it a body corporate, and possessed many franchises, partly by prescription and partly by charter. By a charter, in 1590, Queen *Elizabeth* granted to the mayor, &c. of the said city a prison for keeping all prisoners, committed in any sort howsoever, within the liberties of the said city or the precincts thereof, for any matter, cause, or thing, which ought to be enquired, prosecuted, punished, or determined in the said city: but if any person should be committed for any cause which ought not to be so enquired, &c., then the mayor, &c. *should have power to commit such persons to the common gaol of the county of Somerset*. It further provided, that the mayor, &c. should have power to arrest and examine all felons, thieves, and other malefactors, found within the city, and commit them to the county gaol. By another clause, the bailiffs of the city were to have returns of writs, and of all attachments, arising within the city;

with

The proviso in
55 Geo. 3. c. 51.
s. 1. stating
that that act
shall not give
any jurisdiction
to the justices
of the county
over any places
situate within
the limits of
any liberties or
franchises hav-
ing a separate
jurisdiction, is
confined to
franchises hav-
ing a separate
jurisdiction co-
extensive with
that possessed
by the county
justices; and,
therefore, where
the justices of
the city of *B.*
had no jurisdi-
ction by charter
to try felons,
it was held that
the city of *B.*
was liable to
the county rate.

of the city should be clerk of the peace there; that the mayor should be the coroner, and that the mayor, aldermen, &c. should appoint a chamberlain and receiver, and constables and other inferior officers, within the city. These charters were accepted, and are still in force. The boundaries of the city, as described in the charter of *Elizabeth*, contained within them three entire parishes, namely, the parish of *St. Peter* and *St. Paul*, the parish of *St. Michael*, and the parish of *St. James*; and they contain also a part of the parish of *Walcot*, which latter parish, although partly within and partly without the city, has but one set of overseers, and one poor's-rate for the whole parish. At the time of issuing and delivering the warrant to the defendant, the mayor, recorder, and two aldermen of the city, duly nominated and elected, were justices of the peace in and for the said city, pursuant to the charter of *Elizabeth*, and there was no default of a mayor, recorder, and two aldermen, as such justices, and the quarter sessions were regularly held. The corporation, out of their own funds, have built and repair the bridge within the city, called *The Bath Bridge*, and also the city gaol, of which they appoint the chaplain, the surgeon, and the gaoler, and pay their respective salaries, and the expenses of the prisoners committed thereto; they also built and repair the guildhall, where the city sessions are regularly held, under the charter of *Elizabeth*, and where all the public business of the city is transacted; they also pay the expenses of committing and conveying prisoners to the county gaol for trial for felonies and other offences committed within the city, and which are not cognizable by them, all expenses of a like nature incurred without the city being paid out of the county

rate,

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The KING
against
CLARKE.

in part of the parish of *Walcot*, but they have rated the parish of *Walcot*, without making any such distinction as aforesaid. The number of prisoners sent to the county gaols by the city justices is considerable, and the keeping and maintaining such prisoners, after they are delivered by the city officers at the county gaols, and the charges of their conveyance to and from the assizes and quarter sessions, together with the expenses attendant on carrying their several sentences into execution, have always been and still are paid out of the general county rate.

1822.

The KING
against
CLARKE.

Adam, for the Crown. The city of *Bath* is within the jurisdiction of the county magistrates, for, by the charter, the city magistrates have only the power of trying trespasses, forestallers, regraters, and other extortions. These were the offences cognizable in the court of the leet, and the rule is, that in construing such words, they cannot be held to include felonies, which are offences of a higher nature. In general, whenever a power of holding quarter sessions is given by charter, the power of trying felonies is expressly there given, as appears from the charters of *Nottingham*, *Derby*, and *Leicester*, set out in *James v. Green* (a) *Weatherhead v. Drewry* (b), and *Bates v. Winstanley*. (c) Then if so, the city of *Bath* is not a separate jurisdiction, within 55 Geo. 3. c. 51. He was then stopped by the Court.

Gaselee, contrà. Here, by the charter, the city magistrates have an exclusive jurisdiction as justices of the

(a) 6 T. R. 230. (b) 11 East, 169. (c) 4 M. & S. 429.

peace;

in favour of the defendant, and may be considered in some respects as a legislative exposition of the 55 Geo. 3. c. 51. For it is enacted, that all the costs, charges, &c. attending prosecutions for felony, shall be raised by a separate rate in those places which are there described as being "cities, towns corporate, and places which do not contribute to the payment of the county rate, and have no town rate or public stock." Now, *Bath* comes exactly within this description according to the statement in the case. [Abbott C. J. That act only provides for the expenses of the trial. The costs of maintenance in gaol, and other incidental expenses, are still unprovided for. Bayley J. We must construe the 55 Geo. 3. c. 51. as if the case had come on before the 58 Geo. 3. c. 70. was passed. This latter act cannot be taken as a legislative exposition of the former. If it were so, it would not, in this case, for the reason pointed out by my Lord Chief Justice, give a remedy coextensive with the evil.] Here the justices for the county could issue no process within the limits of the city, *Talbot v. Hubble.* (a) As, therefore, the ordinary jurisdiction of justices of the peace was taken away from the county magistrates, this must be considered as the case of a franchise having a commission of its own, and not subject to the jurisdiction of the commission of the peace for the county. In that case it comes within the 24th section of the 55 Geo. 3. c. 51.

ABBOTT C. J. I am of opinion, that the city of *Bath* is liable to contribute to the county-rate, and that in this case, our judgement should be for the crown. The question depends on the construction to be put upon the

1822.

The KING
against
CLARKE.

(a) 2 Str. 1154.

exempted by any grant, charter, or local act of parliament. Upon the whole, therefore, I am of opinion, that the city of *Bath* does not fall within the proviso. Nor does the 24th section, as it seems to me, carry the case any further, for that clause only applies to such franchises as have commissions of the peace within themselves, and are not subject to the jurisdiction of the commission of the peace for the counties in which they lie. Here, the city of *Bath* was, in my opinion, subject to that jurisdiction, and our judgment, therefore, must be for the crown.

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The KING
against
CLARKE.

BAYLEY J. I am of the same opinion. The county rate is appropriated to certain specific purposes, and the object of the statute 55 G. 3. c. 51. being to have a fair and equal rate, it seems to me, that all ought to contribute to it who derive a benefit from it. Now, one of the purposes of the rate is to maintain felons in gaol, and, in this case, persons imprisoned for felonies committed within the city of *Bath*, are maintained out of the county rate for *Somersetshire*, and according to justice, therefore, the city of *Bath* ought to contribute. The first question is, whether *Bath* be within the limits of the jurisdiction of the county magistrates. Now *prima facie* their jurisdiction is co-extensive with the county, and if they are excluded from any franchise to a limited extent, they still continue to have jurisdiction there, so far as they are not expressly excluded. From the statement of the case, it is clear, that the county justices have a jurisdiction within the city of *Bath*, as far as the trial of felonies there committed. Then does *Bath* come within the proviso? I think not. The separate jurisdictions there mentioned, mean such as are co-extensive with all the purposes for which the county

were proved to be of the hand-writing of those parties respectively. *Rains, Thompson, and Lachlan* had been some time before the drawing of this bill, concerned together in bill transactions ; *Rains* being generally the drawer. The bills to which they were parties, were chiefly for the accommodation of *Rains*, but not solely ; *Lachlan* and *Thompson* had also some accommodation from them. As the bills became due, *Rains* was to draw and provide for them, for the bills accepted by *Lachlan*, he was to draw on *Lachlan*, and for the bills accepted by *Thompson*, he was to draw on *Thompson*. When the bills became due, *Rains* provided for them by redrawing. The bill in question, was drawn, accepted, and indorsed in the course of these dealings. The body of the bill was written by one *James Sims*, who was employed to assist *Rains* in his cash transactions ; *Sims* was not employed by *Lachlan* or *Thompson*. It had been agreed between the parties, that they would not accept bills unless they came through *Sims*. The bills were sometimes accepted in blank. After they were filled up and accepted, they were sometimes in the custody of *Sims*, and sometimes *Sims* handed them to *Rains*, and either *Rains* or *Sims*, as the case might be, handed them to one *Becher*, a commissioned agent or broker, for the purpose of their being delivered out to the world, and *Becher* usually purchased goods with them. The bill in question was filled up and dated by *Sims*, on the 6th *March*, 1818, and was then accepted by *Thompson*, and indorsed by *Rains* and *Lachlan*. On the 9th *March*, *Sims* wrote and delivered to *Thompson* and *Lachlan* written statements, mentioning the particulars of the bill, and that it would fall due on the 9th *September* following. The bill at that time was

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—
Downing
against
RICHARDSON,

security; and, therefore, any alteration before that time does not avoid it. It is clear, that an accommodation-bill may be altered before it is negotiated. In *Bowman v. Nichol* (a), it must be taken from the statement, that the bill was given for value; and if so, the alteration was made after it had been accepted and delivered to the drawer, and when it was therefore an available security. In *Cardwell v. Martin* (b), the respective bills were considered to be issued as soon as the exchange of the acceptances had taken place. So, too, in *Bathe v. Taylor* (c), the bill was accepted for a debt which the acceptor owed to the drawer, and was, therefore, a valid security. So, in *Walton v. Hastings* (d), the bill was accepted on account of a bona fide debt, due from the drawer, and Lord *Ellenborough* expressly states, that it was an existing valid instrument before the alteration. Now, here, as between *Lachlan, Rains, and Thompson*, this was a mere accommodation-bill. No action was maintainable upon it until it passed into the hands of *Howell*, and before that time the alteration had taken place.

1822.

*Downes
against
Richardson.*

Campbell, contra. 1st, At common law no action could have been maintained by *Downes against Thompson* upon this bill. 2dly, If it was an accommodation-bill, it required a new stamp. 3dly, This was not an accommodation-bill. 4thly, It was not altered until after it had been negotiated. As to the first point, no action could be maintained at common law by the plaintiff, as indorsee, against the defendant, as acceptor of this bill. It was originally dated the 6th *March*, and was altered, without the consent of *Rains*, the first indorser, or of

(a) 5 T. R. 537.

(c) 15 East, 412.

(b) 9 East, 190.

(d) 4 Camp. 223.

accepted; and, if so, then this must be considered as the case of an exchange of acceptances, and it falls within the principle of the case of *Caldwell v. Martin*. (a) 4thly, At all events it had been negotiated before it was altered. *Thompson* did not give his assent to the alteration till the bill was in the hands of *Howell*, a bona fide holder for value. The legal effect, therefore, is the same as if *Thompson* had then, with his own hand, altered the date from the 6th to the 16th; in which case the bill would unquestionably have been void.

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ABBOTT C. J. I am of opinion that the plaintiff is entitled to recover. If we were to yield to the objection on the part of the defendant, we should open a door to great fraud. At common law it is clear that this would be a valid instrument, as against the acceptor, having been altered by his consent; but the difficulty arises from the act of parliament, which requires that every bill of exchange shall have a stamp. The question then is, whether this alteration made it a new bill? Now, undoubtedly, when an accommodation bill has the names of the different parties written upon it, it is, in some sense of the word, a bill of exchange; but it is utterly unavailable as a security for money, until it is issued to some real holder for a valuable consideration. But it is said that this was not an accommodation bill. Now it appears there were three persons concerned together, and acting different parts in these bill transactions; one of them drew, another indorsed, and a third accepted these accommodation bills; and it appears that *Sims*, a clerk, was principally entrusted with the possession of this paper for the benefit of all. This,

(a) 9 East, 190.

Y y 4

therefore,

but if it remains in the hands of the original drawer, even with names upon it, under such circumstances as that, he cannot have any legal claim upon those persons, the bill is not issued. Here it was clearly an accommodation bill drawn by *Rains* upon *Thompson*, and indorsed by *Lachlan*, and those parties could not have a valid claim upon it inter se. It was, I think, not issued until the 10th of *April*, when it was passed to *Howell*: but at that time the alteration was made. This bill, therefore, was altered before it was issued, and no new stamp was necessary. But it is said, that, inasmuch as *Thompson* did not assent to the alteration until after the bill was in *Howell's* hands, he is discharged. The fallacy is in considering the assent to the previous alteration as an alteration of the bill de novo at that time; but that is not so. The alteration had vacated his acceptance, and gave him a right to say, "my name is off the bill:" but he may waive the benefit of such an objection, and I think he has done so, for I consider his assent as equivalent to a new acceptance. (a) I think, therefore, that the plaintiff is entitled to judgment.

HOLBOYD J. I am of the same opinion. Independently of the stamp-act, it is clear that the acceptor would be liable; for when he assented to the alteration, it is as if his acceptance had been originally made subsequently to that alteration; for his assent operates as a parol acceptance of the bill. As to the other point, I am of opinion, that a fresh stamp was not necessary, because no one could have maintained an action upon the bill, until it came into the hands of *Howell*.

(a) If the bill had been made after the passing of 1 & 2 G. 4. c. 79. s. 2. which requires the acceptance to be in writing, could the plaintiff have recovered?

1822.

Downs
against
RICHARDSON.

BEST

original writ, of or conversant in *Callerton* aforesaid, and that there was not any town, hamlet, or place of the name of *Callerton* in that county; although there were three distinct townships, called *Black Callerton*, *High Callerton*, and *Little Callerton*, in that county; and that the said *T. Bonner* was, at the time of issuing the writ, of or conversant in the township of *High Callerton*, and that he was not so described in the original writ; and, therefore, there was no addition in the original writ of the town, hamlet, or place, of which *T. B.* was of or conversant. To this assignment of error, the plaintiff pleaded, by way of estoppel, that he prosecuted his writ with intent to declare thereon against *Bonner* upon a bond made by him, in the lifetime of the testator, on the 30th *March*, 1803, and by which the defendant was described as *Thomas Bonner*, of *Callerton*, in the county of *Northumberland*. To this plea there was a demurrer.

1822.
—
*Bonner
against
Wilkinson.*

Littledale, in support of the demurser. The statute 1 *Hen. 5. c. 5.* requires, in every original writ on which an exigent shall be awarded, that, to the names of the defendants, additions shall be made of their estate or degrees, or trade, and of the towns or hamlets, or places, and the counties of which they were or are, or in which they are or were conversant. And if, by process upon the original writ, in which the said additions be omitted, any outlawries be pronounced, that they be void. Now, in the original writ in this case, the defendant is not described as of any town or hamlet; for the Court cannot intend *Callerton* to be a vill. *Bowes v. Howe.* (a) It may be the name of the house of the

(a) *5 Inst. 52.*

defendant,

known in the same county; and 5 *Edw.* 4. 46. is cited. (a) So, in *pl.* 104., in debt against *J. S.*, of *D.*, the defendant said, that the day of the writ purchased he was dwelling at *S.*, and not at *D.*, judgment of the writ; and the plaintiff pleaded the obligation for estoppel, because he was bound in the sum by the name of *J. S.*, of *D.* Per *Prissot*. This is no plea; for he may say, not his deed, and, therefore, no estoppel; and so was the opinion of the Court; but it seems that the reason of *Prissot* is not material, for to every indenture which is pleaded for estoppel, the party may say, non est factum; yet it is a good estoppel *prima facie*; but it seems to me the reason is, inasmuch as it may stand with, &c. for it may be that he dwelt at *D.* at the time of making the obligation, and that he dwelt at *I.* on the day of the writ purchased; and 37 *Hen.* 6. 5. is cited.

1822.

 BONNER
against
WILKINSON.

Tindal, contrà. The defendant below is estopped by his bond; the statute requires that the addition shall be of the town, hamlet, or place, and the latter word must imply something inferior to a town or hamlet. It cannot be in the mouth of the defendant to say that his bond does not contain his true description. And in *Jenkins*, 163. *pl.* 12. this case is stated: *A.* is bound to *B.* in an obligation; *A.* is named of *Dale*, without an addition; *B.* sues *A.* upon this obligation; *A.* shall not be received to plead that there is *Over Dale* and *Nether Dale*; for the obligation is otherwise, and he shall not be received to contradict his own deed, but he shall be estopped by it: and this is said to have been decided by the Justices of both Benches; and 2 *Rich.* 3. is cited. And in *Fitzherb.*, *Estoppel*, *pl.* 81. the same point is stated to have been decided by the

(a) See *Bro.* tit. *Estoppel*, *pl.* 69. 172. 214.

in the time of *Rich. 3.* the judges of both courts, upon conference, decided, contrary to former authorities, that a party should be estopped from saying that he was not of the place of which he had described himself to be by his own deed, and from that time it seems to me that the law has been considered as settled; for, otherwise, there would have been subsequent cases on the subject. The object of the statute was, that it should appear by the description in the indictment or writ, what person of the particular name it was that was intended to be outlawed. Now, that object would be better answered by describing the person as of a particular house, than as of a ville or hamlet, for it is less probable that there should be two persons of the same name in the smaller than in the larger place.

1822.

 BONNER
against
WILKINSON.

BEST J. concurred.

Judgment of outlawry affirmed.

*HALL against Doe on the Demise of SURTEES
and Another.*

Tuesday,
May 7th.

THIS was a writ of error, brought to reverse a judgment obtained in ejectment in the Court of Pleas at *Durham*. The declaration was on a demise by

Where premises were mortgaged in fee, with a proviso for reconveyance, if the principal were not paid on a given day, and in the mean time, that the mortgagor should continue in possession; upon special verdict, it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor: Held, that upon this finding, it must be taken, that the occupation was by the permission of the mortgagee, and, consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations:

Held, also, that an entry is not necessary to avoid a fine levied by the mortgagor.

W. Surtees,

July, 1813, demanded of *Michael Hall* the possession of the same, which he refused to deliver up.

1822.

HALL
against
Doe dem.
SUTTLES.

Littledale, for the plaintiff in error. *William Suttees* is not entitled to recover, because he has not brought his ejectment in time. His right of entry accrued on the 3d November, 1780, when there was default in the payment of the principal and interest. If the interest had been paid from time to time, then indeed the mortgagor could not be considered as holding adversely to the mortgagee.

Hatcher v. Fineaux. (a) But that fact is not found. In *Sir Moyle Finch's case* (b), it is laid down, that a lessee for years, holding over his term, becomes a tenant at sufferance, and shall not pay rent; for it is the folly of the lessor to suffer the lessee to continue in the possession of his land after his term: and it is clear, in this case, that the money not having been paid at the appointed time, the mortgagor was tenant by sufferance; for he came in by a rightful title, though he held over wrongfully. Then, here there being no payment of interest, the mortgagor held by wrong, and consequently the plaintiff ought to have brought his action within 20 years. But, secondly, the plaintiff is barred by the fine, and he ought to have made an entry in order to avoid it. [*Bayley J.* The fine can have no operation; the mortgagor had no freehold; for in order to constitute a title by disseisin, there must be a wrongful entry; whereas in this case, there has been at most only a wrongful continuance of the possession. *Doe v. Perkins* (c) and *Smartle v. Williams* (d) are authorities expressly upon that point.]

(a) 1 *Ld. Raymond*, 740
(c) 3 *M. & S.* 271.

(b) 2 *Iem.* 143.
(d) 1 *Salk.* 245.

gatee, and does not therefore require an entry to avoid it.

1822.

Hall
against
Doe dem.
Suits.

HOLROYD and BEST Js. concurred.

Judgment affirmed.

(a) See *Cooke on the Law of Mortgage*, p. 348.

The KING *against* The Steward and Suitors of
the Manor of HAVERING ATTE BOWER.

CHITTY had obtained a rule nisi for a mandamus to the steward and suitors of the court of the lordship or manor of *Havering Atte Bower*, in the county of *Essex*, to receive and admit the plaint of *Wm. Wood* against *George Butcher*, and to issue process from the said court thereon, and to proceed to hear and determine the same, pursuant to the charter of *2 Jac. 1.* The affidavits set out the charter by which the king granted that the steward and suitors, for the time being, of the court belonging to the manor (which was of ancient demesne) should have power and authority to hear and determine, by plaints to be levied and prosecuted in the said court, pleas, debts, accounts, covenants, trespasses, as well by force and arms committed as otherwise, detention of chattels, and all other contracts whatsoever, within the lordship or manor aforesaid made, done, or arising, although the same debts, &c. do amount to or exceed 40s. The charter had been acted upon, and the court regularly held every three weeks. But by the records it appeared, that the last plaint for a debt or contract had been heard and determined in 1776: the last instance of a suit in replevin was in 1790, and in

By charter the king granted that the steward and suitors of a manor should have power to hold a court for the determination of civil suits, and there had been a non-user of the court for fifty years (except for the purpose of levying fines and suffering recoveries).

Held, that this Court being for the public benefit, the words of permission in the charter were obligatory; and that the right of determining suits was not lost by the non-user.

1822.

The KING *against* The Inhabitants of St.
AUSTELL.

Wednesday,
May 8th,

THOMAS CARLYON, Esq., appealed against the following assessment for the relief of the poor of the parish of *St. Austell*, in the county of *Cornwall*.

Rates on tin and copper dues, and water-courses.

T. C. Esq., for *Crinnis* copper dues.

	£.	s.	d.
Annual return,	-	4080	0 0
Amount taken at two-fifths,	-	1632	0 0
Assessment at 3s. in the pound,	244	16	0

The sessions amended the rate by striking out this assessment, and stated the following case. Mr. *Carlyon*, at the time of making the rate, was not an inhabitant of *St. Austell*, nor the occupier of any land, house, or other property therein, unless he was deemed to be such occupier in respect of the said dues: as to which the facts were, that he being seised in fee of all the lands within which a certain mine was situate, by indenture made 12th *January*, 1811, between him and one *Joshua Rowe*, in consideration of the payment therein reserved, and of the covenants, &c. therein contained, did give and grant unto the said *Joshua Rowe*, his partners, fellow-adventurers, &c. full and free liberty, licence, power and authority, to dig,

Where the owner of the soil, by indenture, granted to certain adventurers full and free liberty to dig, mine, and search for tin, tin ore, &c., and the same to take and convert to their own use, subject to a reservation therein contained, and to make such adits, shafts, &c. as they should think necessary: yielding and paying to him one full eighth share of all such tin, tin ore, &c.; the same having been first spalled, picked, or otherwise made merchantable, and fit to be smelted. And the indenture contained a power either for payment in ore, or the amount thereof in money, which had been acted upon; and the owner had received it in

money: Held, that for this, his one-eighth share, he was liable to be rated as an occupier of land, the reservation operating as an exception out of the demise, and not being of the nature of a rent.

as aforesaid; and would give six days' notice in writing to him, or his agent or toller, of the time of every weighing or division of the tin, tin ore, &c. to be raised and gotten by virtue of these presents: and also, that they would pay all, and all manner of rates, taxes, and assessments whatsoever, which should at any time thereafter, during the term thereby granted, be taxed, charged, assessed, or imposed upon the tin, &c.; and the money which should arise from the sale thereof, or the dues thereby reserved, or upon *Thomas Carlyon*, his heirs or assigns, for or in respect thereof, and indemnify him from the same; and would effectually work the premises in the most proper and effectual manner, with as sufficient number of labouring miners, unless prevented by water or other inevitable impediment. By virtue of this grant or set, the mine had been worked ever since the date thereof, by *Joshua Rowe*, and certain persons or adventurers claiming under him, at their own sole risk and expense, by their own labourers, and under the entire direction and superintendance of their own agents, and without any expense, risk, or interference whatsoever, of or by, or on the part of *Thomas Carlyon*. Various shafts, levels, and other works necessary to search for and obtain ore had been dug and made, and counting houses and other houses built by the adventurers at a great expense, under and by virtue of the said grant or set within the limits thereof; and the mine, and all the erections thereon, and shafts, levels, and other workings within the same, had always, since the working of the said grant or set, been, and still are, in the sole occupation and possession of the adventurers. The mine

1822.

The Kite
against
The Inhabit-
ants of
St. Austell.

upon the ground, that coal mines alone having been mentioned in the statute, the rule *expressio unius est exclusio alterius* applies, and partly because of the risk attending the working of them. In *Rovels v. Gells* (a), the person rated was the lessee of the lot and cope; and he was rated on the ground, that he was the occupier of property to which the risk attending mining concerns did not apply. There, too, the persons working were acting under a general custom within the district, and not under a specific contract, as here. *Rex v. Baptist Mill Company* (b) was also similar, in both these respects, to *Rovels v. Gells*. Here, however, the owner is for the first time sought to be rated; unless, indeed, that question can be said to have arisen in *Rex v. St. Agnes* (c): where, however, the point was not argued. But the cases of *Rex v. The Bishop of Rochester* (d) and *Rex v. The Earl of Pomfret* (e) are in point. Those were both cases of owners letting out their property upon a written contract, and the judgment of the Court was against the rate. The owner of a mine under circumstances like the present, may run a considerable risk; for he may be obliged to incur great expense in opening the mine before he lets it to the adventurer, and after having received the rent in ore, may be at great expense in making the mineral merchantable. Here, by the instrument in question, the right of possession in the mine passed to the adventurer, and the landlord, if he entered upon it, would be guilty of trespass; unless, as in *Doe dem. Hanley v. Wood* (f), he came upon the land for the purpose of re-entry, pur-

1822.

The King
against
The Inhabit-
ants of
St. Averell.

(a) *Cowper*, 451.(b) 1 *M. & S.* 612.(c) 3 *T. R.* 480.(d) 12 *East*, 353.(e) 5 *M. & S.* 139.(f) 2 *B. & A.* 724.

served to the lord, in *The King v. Earl of Pomfret*, was of smelted lead; but here the reservation is of part of the native mineral. On these grounds, it seems to me that we ought to decide in favour of the rate; and I do that with the less reluctance, because it is still open to the party to institute an action against the person who may levy for the rate, and so to bring the question before a higher tribunal.

1822.

The King
against
The Inhabit-
ants of
St. AUSTELL.

BAYLEY J. We ought to lay out of the question the circumstance of this being a failing mine. For it is a beneficial and useful property to the person on whom this rate has been made; and it was held in *Rex v. Parrott* (a) that a coal-mine, whether profitable or not, is still rateable. This falls within the principles laid down in *Rowls v. Gells*, *Rex v. St. Agnes*, and *Rex v. The Baptist Mill Company*, and is distinguishable from *Rex v. The Bishop of Rochester* and *Rex v. The Earl of Pomfret*. Here, the person rated is in fact an occupier of land, and derives a profit in respect of that occupation; and that, according to the doctrine laid down in the first set of cases to which I have referred, makes him rateable; and he has not dispossessed himself of the possession of the land, as was done in the two latter cases. In *Rowls v. Gells* it was first decided, that a party was rateable for lot and cope. It is said, indeed, that the party rated there was a lessee. That distinction makes no difference; for, if the lot and cope had not been rateable in the hands of the original proprietor, it would not have been so in the hands of his lessee. The true ground of that decision was, that the party

(a) 5 T.R. 595.

HOLROYD J. In the view I have taken of this case, I entirely agree with the rest of the Court. The case of *Roxls v. Gells*, although it was doubted by Lord Kenyon in *Rex v. Parrot*, seems to me to have been well decided. It was confirmed by *Rex v. The Baptist Mill Company*, from which I cannot distinguish this case. The case of *Rex v. The Earl of Pomfret* is distinguishable on the grounds already stated.

1822.

The King
against
The Inhabit-
ants of
St. Austell.

BEST J. If it were true that we must either overrule *Rex v. The Baptist Mill Company*, and the cases confirming that decision, or the case of *Rex v. The Earl of Pomfret*, I should be inclined to support the former. But it is not necessary, inasmuch as there is a material distinction between them. Here, it seems to me to be clear, that Mr. Carlyon is an occupier of land. For the mine is not in the exclusive occupation of the adventurers; and whatever, by the indenture, is not granted out of Mr. Carlyon, remains in him. All that the adventurers take under it is a licence to enter and dig, and take away the minerals. But when they have so done, and the minerals are brought to grass, a division of the ore between them and the landlord takes place. This, then, is the same as if, instead of working for wages, they worked on condition of being paid by a certain share of the produce. In this case, therefore, the rate must be supported.

Order of Sessions quashed.

Gurney and *Adam* were to have argued on the other side.

defendant. Here, it does not appear that the defendant knew any thing about it.

1822.

DUNCAN
against
STINT.

Per Curiam. The rule was laid down, as stated in *Du Belloix v. Lord Waterpark*, that when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of *England*; for a defendant ought not to wait until expense has been necessarily incurred, which must frequently be the case, particularly in actions of trespass and replevin. Under the present circumstances, however, we will give leave to the defendant to file, if he can, a supplementary affidavit, stating that, at the time he pleaded, he was not acquainted with the plaintiff's absence from this country. If that affidavit is not filed, the rule must be discharged.

Rule accordingly.

GROTTICK against BAILEY.

Wednesday,
May 8th.

*R*EADER had obtained a rule for setting aside the proceedings on the bail-bond, in this cause, on payment of costs, bail above having been justified. The affidavit of the defendant, in support of the rule, only stated, that he had a good defence to the action.

On motion for setting aside proceedings on the bail-bond, bail above having justified the affidavit, must state that the defendant has a good defence upon the merits.

Lares, on shewing cause, objected, that this affidavit was insufficient, in not having stated that the defendant had a good defence on the merits.

The Court were of this opinion; but the rule was afterwards made absolute, upon terms.

Rule absolute.

1822.

SPENCE and Another *against* JONES, Esq.*Friday,*
May 10th.

DEBT, brought by the plaintiffs in *Easter* term last, against the defendant, the marshal of the *Marshalsea*, for the escape of one *White*, committed to the custody of the defendant in execution. Plea, general issue. At the trial, before *Abbott C. J.* at the *Middlesex* sittings after *Michaelmas* term, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case :

In *Trinity* term, 1820, *White* was duly committed to the custody of the defendant in execution. On the 15th *May*, 1821, a commission of bankrupt was issued against *White*, under which he was declared a bankrupt, and the usual advertisement was inserted in the *London Gazette*, requiring him to surrender himself to the commissioners on the 2d and 9th days of *June*, and on the 7th of *July* then next, at twelve o'clock at noon on each of those days, at the *Guildhall, London*, and make a full discovery and disclosure of his estate and effects; and at the last sitting the bankrupt was required to finish his examination. On the 8th *June* the commissioners issued a warrant to the defendant, as such marshal, *White* then being in his custody, requiring him to bring the bankrupt before them on the following day, the 9th *June*, in order to be examined touching the discovery of his estate and effects, according to the direction of the several acts of parliament in that case made and provided. In compliance with this warrant the defendant, on the 9th day of *June*, brought

The commissioners of bankrupt are authorised by the 49 G. 3. c. 121. s. 13. to bring up a bankrupt, charged in execution, for the purpose of a full disclosure of his estate and effects at any of the three meetings under the commission, or any adjournment thereof.

missioners were obliged to go to the prison and examine a bankrupt charged in execution. And the legislature evidently intended by the statute 49 G. 3. c. 121., that until the last examination the creditor should have the benefit of the bankrupt being kept in close custody.

1822.

 Sawyer
against
John.

Campbell, contra. The commissioners were authorised to bring up the bankrupt at the second meeting. The word "last" may be rejected, if necessary; and it appears clearly, from the entire clause, considered with reference to the 5 G. 2. c. 30., to have been the intention of the legislature that the bankrupt charged in execution should be brought before the commissioners at any time for the purpose of examination. By the 5 G. 2. c. 30. s. 1. the bankrupt is required to submit himself to be examined from time to time by the commissioners, and, upon such his examination, fully and truly to disclose all his effects and estates. The term "examination," therefore, means an examination from time to time. Then, by s. 2., the commissioners are, within the forty-two days, to appoint three several meetings for the purposes *aforesaid*, the last to be on the forty-second day. Then, by s. 6., in case a bankrupt is in execution, the commissioners are to attend him from time to time, and take his discovery as in other cases, and the assignees are required to appoint persons to attend the bankrupt from time to time, and to produce his books, in order to prepare his last discovery and examination. The words "last examination" occur here for the first time, and evidently mean the same thing as discovery. He was then stopped by the Court.

ABBOTT C. J. The question in this case depends entirely on the construction of the 49 G. 3. c. 121. s. 18.

3 A 2

That

being coupled with the word *discovery*, means that discovery and examination which may become final by a full and satisfactory discovery and disclosure of his estate. The words *last examination* seem to have been copied from this statute into the 49 G. 3. c. 121. s. 13., and these provisions being in pari materia, ought to receive a similar construction. I am, therefore, of opinion, that the words *last examination* mean that examination made from time to time, which is ultimately to be the final discovery of the bankrupt's estate and effects. That being so, the commissioners in this case were authorised to have the bankrupt brought before them on the occasion in question; and, consequently, there was no escape, and the judgment must be for the defendant.

1822.

SPENCE
against
JONES.

BAYLEY J. By the provisions of the 5 G. 2. c. 30. the commissioners were bound to appoint three several meetings for the appearance of the bankrupt, the last of which was to be on the forty-second day after his surrender, and if the bankrupt was in execution, the commissioners were bound to attend him in prison three different times. If he was not in execution, the commissioners might send for him, and he was bound to attend them. Under these circumstances the 49 G. 3. c. 121. s. 13. was passed, the object of which appears, by the recital, to have been to remedy the inconvenience which arose from the commissioners being obliged to attend the bankrupt in prison. Now this inconvenience will not be remedied, if the commissioners are authorised only to bring the bankrupt before them once, viz. on the last day appointed for his examination, and are bound to attend him in prison on the first and second day; and a remedial act should be construed so

and the bankrupt is to attend the commissioners, and to be free from arrest during the 42 days, provided that he is not in custody at the time of his surrender. Now, if the commissioners receive a complete disclosure of his effects at the first or second meeting, the bankrupt will not be compellable to make any further disclosure, and, consequently, the last examination may be completed at the first or second meeting. It follows, therefore, that his last examination may be taken on either of those days. Considering then the 49 G. 3. c. 121. s. 13., with reference to the provisions of the 5 G. 2. c. 30. s. 6., I think we are warranted in construing the words "last examination" to mean the complete disclosure and discovery of the estate and effects of the bankrupt made from time to time: and whatever separate attendances are necessary for the purpose of making a full disclosure, constitute together the last examination.

1822.

SPENCE
against
JONES.

BEST J. I think, also, that the words *last examination* do not mean the examination which may take place on the last day of meeting, but the full and final disclosure of the bankrupt's estate and effects upon any of the days appointed for that purpose, and that the commissioners may bring him before them at any time appointed for that purpose.

Judgment for the defendant.

leasing the same, except with the special consent of the plaintiff. The plaintiff averred, that after the making of the indenture, he, on 12th *May*, 1821, commenced an action in the name of *Brodrick* against *Rowe*, upon the bond, to recover the principal and interest; yet, that the defendant, not regarding his covenant, did not, nor would, (although he was afterwards, to wit, on the day and year last aforesaid, requested by the plaintiff so to do,) avow, justify, and maintain, ratify or confirm the said action so commenced; but, on the contrary thereof, after the making of the said indenture, to wit, on the 6th day of *March*, 1821, &c. at, &c. the defendant did execute to *Rowe* a general release of all actions, bills, bonds, &c. By reason whereof, the plaintiff was hindered from recovering the principal money and interest made payable by the bond, and in proceeding in the action so commenced by him, and had also been deprived of the means of recovering the costs incurred by the action, and had sustained costs in endeavouring by rule of Court to set aside the release. Demurrer to this breach of the declaration, and the causes assigned were; first, that there was no venue to the allegation of request in the declaration; and, secondly, that, by that breach, the plaintiff sought to recover damages which he was not entitled by law to recover.

Gaselee, in support of the demurrer. By this deed, the defendant covenants, at the request of the plaintiff, to avow, justify, and maintain all actions brought by him. *Lowe v. Kirby* (*a*), *Pecke v. Mithwolde* (*b*), *Banks v. Thwaites* (*c*), and *Back v. Owen* (*d*), are authorities

(*a*) *Sir W. Jones*, 56.
(*c*) *5 Lcen.* 73.

(*b*) *Ibid.* 85.
(*d*) *5 T. R.* 409.

1822.

AMORY
against
BRODRICK.

disabled himself from supporting any action whatever, and that is the substantial part of the breach, and a request is wholly unnecessary. As to the second cause of demurrer, it is sufficient to say, that it is no good ground of demurrer to the whole breach, that the consequential damages are not recoverable. The plaintiff is entitled to recover some damage, and that is sufficient to support the breach.

1828.

A ~~MARY~~
against
~~BRENDAKIE.~~

HAYLES J. The case of *Duffield v. Scott* (a) is an authority to shew that the last ground of demurrer cannot be supported. That was an action of debt on bond conditioned for the performance of covenants: uponoyer of the bond and of the deed there appeared to be a covenant by the testator to indemnify the plaintiff against all debts which his wife should, during separation, contract, and against the payment of alimony, and all costs which the plaintiff should be put to by his wife's contracts, debts, &c. The breach assigned in the replication, was, that A. B. had brought an action against the plaintiff for a debt which his wife had contracted during separation, and had recovered judgment for the debt and costs, and that the plaintiff was obliged to pay the same, and to incur expences in the defence of the suit; yet that the defendant did not indemnify the plaintiff for the costs so paid by him, or for his expences. Upon demurrer it was argued, that the replication could not be supported, because the plaintiff had assigned a breach for the non-payment of a gross sum, part of which the defendant was not bound to pay; because, in order to entitle plaintiff to recover the costs

(a) 5 T. R. 374.

not entitled to recover, will not prevent him from maintaining his action. If this objection be a ground of demurrer in itself, it should, at all events, have been confined to that part of the breach only.

1822.

 AMORY
against
BRODRICK.

BEST J. concurred.

Judgment for plaintiff

SMITH *against*. PRITCHARD.

Friday,
May 10th.

CARTER had obtained a rule nisi for setting aside a warrant of attorney, and the judgment entered up thereon, given to secure an annuity, on the ground that the description or place of abode of the witness to the warrant of attorney was not correctly stated in the memorial. It appeared from the affidavits that it was thus stated in the memorial: “*Charles Rilot, clerk to William Ager, of Great Marlborough-street, in the county of Middlesex, gentleman.*” *Charles Rilot* did not reside in *Great Marlborough-street*; but was a clerk to *Mr. Ager*, who resided there; and it was sworn that he had been well known to the defendant for thirteen years. In support of the rule *Darwin v. Lincoln* (a) was cited.

Under the
53 G. 3. c. 141.
s. 2. it is re-
quisite that the
memorial of an
annuity should
contain the
names and
places of abode
of the witnesses
to a warrant of
attorney, given
as a collateral
security; and,
therefore,
where it was
thus stated, *A.*
B., clerk to *J.*
S. of *D. Street*,
in the county
of *M.*, gent.:
Held, that this
was not suffi-
cient, it appear-
ing that *A. B.*
did not reside,
but only attend-
ed at the office
there at the
time.

Denman shewed cause. In *Darwin v. Lincoln* the subscribing witness was merely described as clerk of *Mr. Birkett*, and *Mr. Birkett's* residence was not added. So that there is a distinction between the two cases; for, here, he is described as clerk to *Mr. Ager*, of *Great*

(a) *ante*, 444.

ABBOTT C. J. I still retain the opinion which I delivered in *Darwin v. Lincoln*, that, taking the second clause of the 53 G. 3. c. 141. and the schedule together, they require, not merely that the name, but the place of abode of the witness should be stated in the memorial. For the second clause requires that the names of the witnesses shall be inserted in the form or to the effect following, and, in the form given by the schedule, after the name of the witness, the word "of" is inserted. Now, that must mean, as it seems to me, that his place of residence should be added. The case of a soldier or a sailor, who may have no place of residence at the time, has been mentioned. Possibly those cases may be provided for by the subsequent words of the clause, giving a power of making such alterations in the schedule as the nature and circumstances of the particular case may reasonably require; and if, therefore, the witness has really no place of residence, the memorial may be sufficient, if it contain a description of him like that suggested in argument. But that is not suggested in the present case. There may be very good reasons why the legislature should require the residence of the party to be stated: for, by applying there, information may be obtained from persons perfectly disinterested, which may not always be the case where application is made at the attorney's office, where the deeds have been executed.

1822.

SMITH
against
PRITCHARD.

Rule absolute.

Ireland, under 59 Geo. 3. c. 12. s. 33. That act provides, that if an *Irishman*, not having gained a settlement in any part of *England*, shall become chargeable to any parish, by himself or his family, they shall be passed, under the provisions of that act, to *Ireland*. Now here the pauper did become chargeable by his family: for his daughter being an unmarried woman, and pregnant, was, according to the 35 Geo. 3. c. 101. s. 6. actually chargeable to the parish where she was residing.

Per Curiam. We are of opinion that the chargeability contemplated by the legislature in 59 Geo. 3. c. 12. s. 33. was the actual asking for parish relief, and not the constructive chargeability created by 35 Geo. 3. c. 101. s. 6. The order of sessions is wrong, and must be quashed.

Order of sessions quashed.

Scarlett and Courtenay were to have argued on the other side.

1822.

The KING
against
The Inhabit-
ants of
WHITEHAVEN.

disposed of, the surplus remaining, and book-debts, with all my ready money and monies in the public funds, and monies upon bonds, and mortgage, and otherwise, whomsoever, wheresoever, and whatsoever, I give equally, share and share alike, to be divided amongst my three daughters, *Elizabeth, Ann, and Sarah*, to be paid them severally when they arrive to the age of twenty-two years, their equal share, and not before; and desire my executors, &c. may place the said sum, be what it will, out to interest, either in the public funds or for other real security, and apply the interest to their support, in order for the said interest to find them food and clothes, and pay for their education, or what is judged needful by their trust, so that they may not be obliged to live upon any part of their mother's small income; and in case either of my three daughters, *Elizabeth, Ann, or Sarah*, shall die before they arrive to the age of twenty-two years, or die single, or before marriage, the said deceased's portion shall be equally divided between the two surviving sisters, share and share alike, or their heirs; also, in case two of my daughters die without heirs, then the whole devolves to the surviving one, and her heirs, in case no husband is living; if so, they enjoy the property during life only, and afterwards her or their fortune goes to the heir or heirs of their sister, as heirs at law. I also make this reserve, in case all my three daughters shall die without heirs, and leave no husband living, or at the decease of the said husband or husbands, should it happen such then exist at their decease, I give, out of the before-mentioned estates, &c. [be then specified certain pecuniary legacies.] And if this should happen, when those legacies are so paid, I leave and give

1822.

Dot dem.
Davies
against
Bowling.

beth, descended on her and Mrs. *Driver*, as surviving coheiresses. The testator first disposes of all his real property in fee to his three daughters, and then altogether of his personal estate. The daughters are to take equal shares, and the interest of their shares is to be applied to their support. And then, in case one of them dies under 22, her portion is to be equally divided; and if two die without heirs, then the whole devolved on the survivor. All this applies to the personal property, for the words share and portion are synonymous, and the former clearly is confined to the personal estate. If so, the devise by implication to the husband for life cannot apply to the real estate, and then the defendant has no title.

1822.

Dor dem.
Driver
against
Bowling

Chitty, contra. The devise applies to the whole, both real and personal. The word portion obviously refers to the previous division made by the testator of specific portions of his real property to his three daughters. And the words following them, relied on by the other side, are strong to this effect. For the testator, after saying, that the whole devolves to the surviving daughter in case no husband be living, adds, "if so they enjoy the property during life only, and afterwards her or their fortune goes to the heir of the surviving sister as heirs at law." These words property and fortune, apply to the whole given by the will, and the devise over is to the heirs of the sister as heirs at law, which can only be in case of real property. Then the devise over to the uncles is also strong; for he gives legacies "out of the before mentioned estates," which is strong to shew real property was intended, and ultimately after these legacies are paid, devises all the residue of his estates to be

property during life only, and afterwards her or their fortune go to the heirs of their sister as heirs at law.' And in case all three die without issue "and leave no husband living, or at the decease of such husband, should it happen such then exist at their decease," he gives certain legacies out of "the before mentioned estates," and all the residue of the estates to be sold and equally divided among his three brothers, share and share alike. Now it seems to me, that the word estates is large enough to comprehend, and is most properly applicable to real property, and the direction that the estates shall be sold confirms that opinion. The provision in the will respecting the husband, is not an unusual provision. Although, therefore, there are no express words giving an estate for life to the husband, yet, as it appears from the will, that the heir at law is not to take till after his death, it seems that the husband by necessary implication takes an estate for life. The defendant is therefore entitled to our judgment.

BAYLEY J. If an estate be given to the heir at law expressly after the death of A., A. takes an estate for life by implication. Now that is clearly the case here, unless the latter part of the will be confined to the personal property alone: and taking the whole will together, it seems to me, that it is not so confined, but that it extends to the real property also.

HOLROYD and BEST Js. concurred.

Judgment for defendant.

1822.

Dor dem.
DRIVER
against
BOWLING.

gave notices of trial after *Trinity* term; but there being no sittings at *Westminster*, the causes were not tried. In *Michaelmas* term they gave notices again, and made up the records for trial. The causes, after having been appointed for trial, were, in consequence of the pressure of business, made remanets to the sittings after *Hilary* term, upon the prosecutors' records. In *Hilary* term the recognizances were estreated, (without any notice to the defendant, or any motion for that purpose made by the prosecutors,) in consequence of the defendant's default, in not giving notices and making up the records, either in *Trinity* or *Michaelmas* terms last. It was contended, on the part of the defendant, that the estreat was irregular, inasmuch as the records having been actually taken down for trial by the prosecutors, no default had been made by the defendant, who was ready and willing to be tried there. And, besides, in this case, the defendant had no notice of his default.

1822.

The King
against
Clark.

Per Curiam. It was the defendant's duty, in pursuance of his recognizances, to be prepared, according to the practice of the Court, to try at the sittings after *Trinity* or *Michaelmas* terms, and he was not so prepared; for he neither gave notice to the prosecutors, nor made up the records, on either occasion. And the prosecutors having done so is immaterial to the question. There was no necessity to give any notice to him that his recognizances would be estreated: for he was bound to take notice of the terms of his own recognizances. The rule must, therefore, be refused, the estreat being quite regular, and conformable to the ordinary practice of the Court.

Rule refused.

1822.

The KING against EDMUND GRIFFITHS, Esq.

MANDAMUS directed to the mayor, aldermen, and common council of the city of *Bristol*, to restore the defendant to the office of steward of the Tolzey Court of that city. The corporation returned in substance as follows: That the mayor, burgesses and commonalty of the city of *Bristol* were a corporation by prescription. And that the Court of the Tolzey in the said city was an ancient court of record, holden in the *Guildhall* of the said city, before the sheriffs, according to the law of merchants, and according to the immemorial usage and custom of the said city, and according to the liberties granted by charter, having cognizance of pleas to an unlimited amount, and having also privilege of proceeding by foreign attachment; and that the office of steward of the said court, was an office of great trust, touching the administration of justice therein; and that it was the duty of the steward to attend the court whenever the same was holden, and more particularly courts appointed for trials of causes at issue. It then set out a charter of *Charles the Second*, incoporating the common council, and giving a power of making bye laws, and providing, that in case of death, amotion, &c. the steward should be elected by the mayor and common council. On the 10th *September*, 1795, Mr. *Griffiths* was elected by the common council, and took the oath of office. In 1814, whilst the defendant was steward, it appearing to be expedient that courts should be holden more frequently than they had usually been, it was determined

Where a return to a mandamus to restore a party to a corporate office is defective in form, but, on the whole, it appears that there is good ground for amotion, the Court will not award a peremptory mandamus; the only effect of which would be to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner.

by

of which notice was given to the defendant, stating that there were causes at issue, and ready for trial; but he did not attend, in breach of the duty of his office. The same happened on the 29th *November* and 13th *December* 1819, and 24th *April*, 5th *June*, 28th *August*, and 18th *September* 1820, and thereby he delayed the suitors; and by this irregularity and unfrequency of holding the courts, suitors were prevented from bringing actions. On 18th *December* 1820, the sheriff appointed another court for trials, of which the defendant had notice. On this he wrote a letter, saying, he could not concur, and could not have any court until the 8th *January*, and omitted attending on the 18th *December*. On the 13th *December*, 1820, a meeting of the common council was held, when the sheriff's report was read, which stated, that ten courts had been appointed, at only one of which the defendant had attended; and it was resolved that he should have notice to attend at the then next meeting of the common council, to be held at the court-house on the 6th *January*, to shew cause why he should not be removed by the mayor and common council from his office of steward of the court, for his repeated absences from the courts, and the injury and inconvenience sustained by the public in consequence thereof. Notice of this was given to him on the 16th *December*. On the 6th *January*, 1821, a meeting of the mayor and common council, at the court-house, was duly held, for the purpose of considering the premises, &c. At this meeting the defendant did not appear or shew cause; whereupon an order was made to remove him, and his office was declared vacant. On the 13th *January* a successor was elected, who took upon himself the office.

1820.
The KING
against
GRIFFITHS.

Griffiths,

the one depend on those of the other. Here, the two are wholly unconnected.

1822.

The King
against
Griffiths.

ABBOTT C. J. It is unnecessary to pronounce any judgment upon the formal objections taken to this return, because I am clearly of opinion, that the Court are not to grant a peremptory mandamus in a case where, if the party was restored, he might be immediately removed again. The case of *Rex v. The Mayor of Newcastle*, cited in 1 *Burr.* 530., is an authority in point. There it appeared by the return, that there was a power to remove Mr. *Featherstonhaugh*, and the Court refused to interfere; and there are other cases which support the same principle. Now, from the facts stated on the face of this return, and if they are untrue the defendant may bring an action for a false return; it appears that the Tolsey Court of *Bristol* is an immemorial court, and that it is the duty of the steward to attend it whenever it is held. It is then stated, that in 1818, the defendant was appointed to the office of a police magistrate at *Shadwell*, and that from that time he ceased to reside at *Bristol*, or within an hundred miles thereof; his office of police magistrate being one which requires continual attendance in *London*. Now, it seems to me to be impossible to say, that this did not afford abundant cause for filling up the office with some other person. Without, therefore, giving any opinion upon the formal objections taken to this return, I think we ought not to grant a peremptory mandamus; because, by so doing, we shall only unnecessarily harass the parties in this case.

BAYLEY J. It is in the discretion of the Court, according to the cases cited, to grant a peremptory mandamus;

Griffiths has long ceased to do the duties of the office in the Tolzey Court, and he has now incapacitated himself by accepting a situation which requires his constant attendance, above 100 miles from *Bristol*. It has been urged, that by an arrangement with his brother magistrates, he may always be absent from *London* on *Saturday*, *Sunday* and *Monday*, and therefore, that he could attend in his place at *Bristol* on *Monday*. But the sickness of a magistrate might interrupt this arrangement, or the state of the town might require the attendance of more than the ordinary number of magistrates. Ought any man to take an office, the duties of which are to be performed at a great distance from *London*, on the expectation of the uninterrupted continuance of this arrangement amongst the police magistrates? By restoring Mr. *Griffiths*, instead of advancing justice, which is the object to be maintained by a mandamus, we stop the course of justice at *Bristol*, until he shall be regularly removed, and another person again appointed in his place.

1822.
—
The King
against
Griffiths.

Peremptory mandamus refused.

WEST against FRANCIS.

Wednesday,
May 15th.

DECLARATION stated, that the plaintiff was the proprietor of seven prints therein described, and that he was entitled to the sole right and liberty of printing and reprinting the same; yet, that the defendant published, sold, and disposed of 500 copies of each of the original; and that although the vendor did not know it to be a copy.

The vendor of a print, being a copy in part of another, by varying in some trifling respects from the main design, is liable to an action by the proprietor.

in part, by varying, adding to, or diminishing from the main design, &c." Now, it is clear, that an action would lie against the party who copied in part, by varying, adding to, or diminishing from the main design. The statute then goes on, "or shall print or reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or shall publish, sell, or otherwise dispose of any copy of any print, which shall be engraved, &c., in any part of *Great Britain*, without the express consent of the proprietor thereof in writing, &c. &c.; then every such proprietor, &c. shall by a special action upon the case to be brought against the person so offending, recover such damages as a jury, &c. shall give, together with double costs of suit." The question is, whether that which would clearly be a copy within the former part of the section, is also a copy within the latter branch. The whole clause forms one entire sentence, and a copy with variations is evidently within the latter as well as the former. Indeed, such a copy comes within the popular sense of the word. Suppose a party copied a writing without inserting the capital letters, or that he copied a map and put the names of the places in italics, each of these, strictly speaking, would be a copy, though not a copy in all its parts. So there may be a copy of a print with small variations, although it be not an exact copy. In *Gahagan v. Cooper* (*a*), the declaration confined the case to the selling exact copies. Here, the declaration contains a count for selling copies in part by small variations from the main design, and therefore, that point does not arise: and the objection, if it be one, is on the record. The 8 G. 2. c. 18. s. 1. is a statute on the same subject, and enacts, "That every person who

1822.

West
against
France(*a*) 3 Campb. 111.

costs. The action is not brought for a penalty under the 8 G. 2. c. 13. but is a special action on the case, given by the 17 G. 3. c. 57. In the former statute, the persons engraving and selling the prints, or causing to be engraved, copied, or sold, in the whole or in part, are guilty of an offence. But the party merely selling is only guilty of an offence when he knows it to have been printed without the consent of the proprietor. Considering the two acts together, it is rather to be inferred that the legislature meant the seller only to be liable to an action where he knew the copy was printed without the consent of the proprietor. The statute meant to distinguish between a fraudulent alterer and a mere seller. Here, the prints sold by the defendant varied from the plaintiff's prints; and, therefore, cannot be considered to be copies. The case of *Gahagan v. Cooper* (a) is expressly in point. It was, in that case, held to be no offence under the 38 G. 3. c. 71., which was made to prevent the pirating of busts and other figures, made and published by statuaries, to sell a pirated cast of the bust, if the piracy has any addition to or diminution from the original, and the words of that act of parliament are very similar to the present.

1822.

 WEST
against
FRANCE

ABBOTT C. J. This act of parliament was intended to preserve to artists the property of their works. The question is, what is the meaning of the word "copy" of a print. Now, in common parlance, there may be a copy of a print where there exist small variations from the original; and the question is, whether the words are

(a) 3 Camb. 111.

applies to persons who actually make the copy, and who, therefore, must know that it is a copy. But the latter branch applies to all persons who shall import for sale, or sell any copy of a print. Every person, therefore, who sells a copy which comes so near the original as this, is thereby made liable to an action. There can be no reason why a person should not be liable where he sells a copy with a mere collusive variation; and, I think, we should put a narrow construction on the statute, if we held such a collusive variation from the original not to be a copy. A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original. For these reasons, I think, the plaintiff is entitled to recover; and, consequently, that the rule must be discharged.

1822.

WEST
against
FRANCIS.

HORROYD J. I am of the same opinion. We should be careful not to give too extensive a construction to this act of parliament, but, at the same time, one sufficient to remedy the mischiefs intended to be guarded against. The question is, what is the meaning of the word "copy." Now, in the preceding part of the clause, the legislature have called that a copy, which is not strictly so in all its parts, being one varying from the main design; and I think that the word must have the same construction in the latter part. *Gahagan v. Cooper* was decided upon another act of parliament, and Lord *Ellenborough*'s judgment proceeded upon the particular mode in which the counts of the declaration were framed.

BEST J. concurred.

Rule discharged.

to give evidence of administration of the assets, and the plaintiff obtained a verdict for the full value of the goods. A rule nisi having been obtained for a new trial,

1822.

 WOOLLEY
against
CLARK.

Brougham and *Chitty* now shewed cause. The property vests in the executor from the time of the death of the testator; and, consequently, the defendant in this case had no right, as against the rightful executor, to sell these goods. The case of *Allen v. Dundas* (*a*) is an authority only to shew, that a payment made to an executor, acting under an existing probate, by a party ignorant of its being unfairly obtained, is valid; and *Parker v. Kett* (*b*) only shews, that the party will be bound by a legal act done by an executor *de son tort*; but here the act was illegal.

The Solicitor-General and *Wightman*, contra. In *Allen v. Dundas* it was held, that the payment of money to an executor, who had obtained probate of a forged will, was a good discharge to the debtor of the intestate; and in *Packman's* case (*c*) it was held, that though letters of administration be countermanded and revoked, a gift or sale made by the administrator acting under the probate was not thereby defeated; and *Semine v. Semine* (*d*) is an authority to the same effect.

ABBOTT C. J. There is a manifest distinction between the case of an administrator and an executor. An administrator derives his title wholly from the ecclesiastical court. He has none until the letters of administration

(*a*) 3 T. R. 125.

(*b*) 1 Ld. Raym. 658.

(*c*) 6 Co. 19.

(*d*) 2 Lev. 90.

larity. On shewing cause, the matter was referred to the Master, who, on this day, reported that the defendant ought to have justified his bail on *Monday, 4th February*. On *Saturday, 2d February*, the defendant served a summons for payment of debt and costs, returnable on the 4th. The plaintiff's attorney did not attend, and the summons was renewed for the 5th. The bail not having justified on the 4th, the plaintiff, on the 5th, obtained the attachment. The Master was of opinion, that the attachment was irregular, because the plaintiff's attorney, by absenting himself from the first summons, ought not to be allowed to get the advantage of an attachment, which he would not have got if he had attended; as the Judge would probably, in that case, have directed the debt and costs to be paid on the 4th; and if not paid, then the attachment might have issued.

The Court, after hearing Abraham in support of the rule, and D. F. Jones contra, made the

Rule absolute.

HARVEY against COOKE.

*Friday,
May 17th.*

GURNEY had obtained a rule nisi to discharge the defendant out of custody in this case, on the ground that she was a married woman. The defendant's affidavit stated, that she was a married woman, "as by the certificate annexed will appear," and that her husband, be positively stated in the affidavit. And, therefore, where it was sworn that she was a married woman, as by certificate annexed will appear, it was held insufficient.

On an application to discharge a defendant out of custody on the ground that she was a married woman, it is necessary that that fact should be positively stated in the affidavit.

James

1822.

CHAPPELL and Others *against* ASHLEY.*Friday,*
May 17th.

*A*NDREWS moved for a rule nisi, to discharge the rule obtained by the plaintiffs for bringing up the defendant, under the compulsory clause in the Lords' act, for irregularity, in consequence of the insufficiency of the affidavit on which it was drawn up. By 32 G. 2. c. 28. s. 16. notices are required to be served on all and every creditor or creditors at whose suit a prisoner is detained in custody; if such creditor or creditors can be found out or met with; and, if not, then to the several attorneys last employed in the respective actions in which such prisoner shall be detained in custody. And it further provides, that every such prisoner, who shall be brought up, &c. shall, on proof being there first made of such notices as aforesaid having been given, deliver in open court a full, just, and true account, &c. The affidavit, on which the rule was obtained, stated, that Mr. *Bish*, one of the detaining creditors, had been served with a notice, by delivering and leaving a copy of it with one of his clerks, at his house in *Cornhill*. As to another creditor, named *Dickens*, it was sworn that he was resident abroad, and that the notice was personally served on Mr. *Pocock*, one of the firm of *Pocock* and Co.; his attorneys; but it was not sworn that *Pocock* and Co. were the attorneys last employed by *Dickens* in the suit under which the defendant was detained in custody. It was contended, in support of the motion, that the legislature, in requiring service on the creditor, if he can be found or met with, obviously must have meant

The notices required by
32 G. 2. 28.
s. 16. need not
be personally
served on the
detaining cre-
ditors. Where
the service was
sworn to be on
the attorney of
a creditor re-
siding abroad,
it was held suf-
ficient, although
the affidavit did
not state that
he was the at-
torney last em-
ployed in the
suit under
which the in-
solvent was de-
tained, the ob-
jection being
taken by the
insolvent, and
not on the part
of the creditor.

personal

Espinasse shewed cause, and contended, that there was no ground for this application ; and that the proper course was, either for the defendant to have replied or demurred to the plea.

1822.

SHADWELL
against
BEATHOUDE.

Per Curiam. This rule must be made absolute, for the plea was obviously for the purpose of gaining time, and would naturally induce the attorney for the plaintiff to consult counsel upon it ; and, in such cases, if the plea be false, the Court will permit judgment to be signed. If these pleas are to be tolerated, the defendants ought, at least, to be compelled to adopt old and well-known forms.

Rule absolute. (a)

(a) This rule was again laid down by the Court in *Body v. Johnson*, in this term. There the plea was the general issue as to all the plaintiff's demand, except a certain sum ; and as to one-third of that sum a bond given in satisfaction ; as to another third, a set-off ; and as to the residue, a promissory note for the amount, given to the plaintiff, and still due. There, also, there was an affidavit that the plea was altogether false, and the Court permitted the plaintiff to sign judgment. In *Corbett v. Powell*, in the same term, the facts were these, Debt on bond by an executor. Plea, assignment of the bond before the death of the testator, and payment to the assignee. Replication, taking issue on the payment to the assignee. According to the ordinary practice, the similiter was added in the office ; and after notice of trial given, the defendant, according to the ordinary practice, struck out the similiter, and demurred specially to the replication. There was an affidavit that the plea was false ; and the Court, after hearing *Goselce*, who shewed cause, and *Merewether*, in support of the rule, made the rule absolute for signing judgment, as for want of a plea.

1822.

HAYWOOD, Gent., one, &c. *against CHAMBERS.* Saturday,
May 18th.

ACTION on a promissory note, dated 16th December, 1815, for 24*l.*, payable on demand: with other counts for work and labour, &c. The defendant pleaded his bankruptcy to all the counts, except that upon the promissory note, and gave notice to the plaintiff to prove the consideration for the note; he also obtained a Judge's order for particulars, under which the plaintiff had delivered a particular, stating the consideration for the note to have been business done by the plaintiff, as attorney for the defendant, prior to July, 1815. At the trial, at the *Guildhall* sittings in this term, before Abbott C. J., it appeared, that, on the 3d November, 1815, a commission of bankruptcy was issued against the defendant, under which he had obtained his certificate, and that the plaintiff was a commissioner named in the commission, and that he acted as such, and signed the defendant's certificate. The note was given in the interval between the second and third meetings under the commission. The debt for which the note was given, was not proved under the commission. Upon this, Gurney, for the defendant, objected at the trial, that the promissory note was invalid, inasmuch as the defendant was protected from the debt, for the business done for him by the plaintiff, by his certificate; and it could not be permitted, that a creditor should avail himself of his power as commissioner, and while the commission was in progress, to extort from the bankrupt a security for his debt. The Lord Chief Justice

A bankrupt in the interval between the second and third meetings under his commission, gave a promissory note as a security for a pre-existing debt to a creditor, who was acting as one of the commissioners at the time, and afterwards signed the bankrupt's certificate. The debt for which the security was given was not proved under the commission: Held, that such security was invalid, and that no action could be maintained upon it.

1822.

The KING against The Justices of LANCASHIRE.

*Vestry
May 30th.*

J. WILLIAMS had obtained a rule nisi for a mandamus to the defendants, to enter continuances, and hear the appeal of *Samuel Stansfield*, one of the overseers of the township of *Ashton-under-Lyne*, in the county of *Lancaster*, against the allowance of the sum of 24*l.*, in the constable's accounts for that township. It appeared from the affidavits, that the constable, pursuant to the 18 Geo. 3. c. 19. s. 4., had laid his accounts before a vestry meeting, on the 26th *October* last, when the item in question, being the amount of the expenses of a prosecution for a misdemeanor against *Mr. Samuel Waller*, a dissenting minister, for preaching in the streets, was disallowed by the vestry. He then, pursuant to the act, laid the accounts, on the 1st *November* last, before two justices of the peace for the county, by whom the disputed item was allowed. Against this allowance *Stansfield*, one of the overseers of the township, appealed. At the sessions, the remaining overseers, being seven in number, appeared, and being sworn, stated, in open court, their dissent from the appeal; and on this ground the sessions dismissed it, being of opinion, that unless the majority, at least, of the overseers concurred in it, the fifth section of the act gave no appeal.

The 18 G. 3.
c. 19. s. 5.
gives an appeal
only in case the
majority of the
overseers con-
cur in it.

Coltman shewed cause. The Sessions have decided right in refusing to hear the appeal. By the 5th section of the 18 G. 3. c. 19. it is provided, that in case the

singular number, be, for the first time, introduced in the appeal clause, if it be not that one overseer may appeal? The act cannot be speaking of some supposed case, of only one overseer being in a township; for one overseer cannot exist, by law, so as to be capable of doing any act. If, by death, the overseers be reduced to one, he cannot do any act until some other is appointed. Then, unless the intention be, that one of many overseers shall have the power to appeal, this word, "overseer," is altogether without any meaning.

1822.

The KING
against
The Justices of
Lancashire.

ABBOTT C. J. It is much to be lamented, that, in the different sections of this act of parliament, we should find a variety in the expressions used. But, looking at the whole, it seems to me that the words "the overseer or overseers," used in the 5th section, are to be construed in the same manner as the words "the overseers," used in the 4th; and that, by both, the collective body of the parish officers must be meant. I think, therefore, that the legislature did not intend thereby to give an appeal to any one of that body. It is urged, that by this construction the parish may sustain great injury; and, undoubtedly, it may happen that there may be no appeal, and that too contrary to the wishes of the majority of the persons rated. But this act of parliament seems to me to have intended to leave the appeal entirely to the discretion of the parish officers. In case the appeal be unsuccessful, costs are given; and, therefore, if we were to allow one of the overseers to appeal, and the Sessions awarded costs against him, he might possibly charge them to the parish rate. In *Rex v. Pascoe* this consequence could not have followed. I am, therefore, of opinion, that

1822.

Ex parte DEACON.

HOLT moved for a mandamus to the commissioners of the Court of Insolvent Debtors, directing them to receive and hear the petition of one *Mary Deacon*, a prisoner confined in the King's Bench prison, and to proceed to an adjudication thereupon. The prisoner was a married woman, and had been arrested, together with her husband, for a debt due from her before coverture, and both were then in execution for that debt. An application had been made to the Court of Common Pleas, in which court the action had been brought, to discharge the wife, but that Court had refused. In consequence of this refusal she applied to the Court of Insolvent Debtors; filed her petition and schedule in due time, executed the regular assignment, and offered to submit to such other conditions as the Court, by the act 1 Geo. 4. c. 119. is authorised to impose upon insolvents seeking relief. The commissioners, however, were of opinion, that being a married woman, she was not entitled to the relief of the act, inasmuch as she could not comply with the terms of the 25th section, by which it is enacted, "that when an order is made for the discharge of a prisoner, the Court may order that a judgment shall be entered up against such prisoner, in some one of the superior courts of Westminster, in the name of the assignee or assignees of such prisoner, &c. &c. &c.; and that such prisoner shall execute a warrant of attorney to authorise the entering up of such judgment, and such judgment shall have the

A married woman who, with her husband, is in execution for a debt contracted by her before coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney, and complying with the other terms required by the 1 G. 4. c. 119. s. 25.

applicant may remain a prisoner for life, if the present construction of the commissioners is right.

1822.

 Ex parte
Dracom.

Per Curiam. We cannot interfere; the acts of a minor are not necessarily void but voidable only, and a minor may execute a deed for his own benefit. This woman cannot comply with the conditions of the act, and the commissioners have it not, therefore, in their power to discharge her; she is now in prison with her husband, who ought to pay this debt himself, and has not sworn to his incapacity so to do. The court in which the action was originally brought, may order her discharge, if they think proper; but we have no power; and we do not think that the commissioners of the Insolvent Debtor's court have misconstrued the act of parliament, in deciding, that a married woman who has no property to assign, who cannot execute a warrant of attorney, and comply with the other conditions, is not entitled to her discharge.

Rule refused.

The KING against The Justices of FLINTSHIRE.

Monday,
May 20th,

PARKE, in last Michaelmas term, obtained a rule nisi for a certiorari, to remove an order of Sessions of the county of *Flint*, dated 12th July last, for levying and paying into the hands of the treasurer of that county 200*l.* 5*s.*, to enable him to pay that sum, in part-payment of the claim of Messrs. *Sankey*. It appeared that, by a former order of Sessions, the treasurer had been empowered to borrow from Messrs. *Sankey*, who

An order of sessions for levying and paying to the treasurer of the county, a sum to enable him to reimburse certain persons for an antecedent debt, although such debt had been incurred for county purposes, is bad.

its being *French* verdigrise, that had not paid duty. Second count, for taking the verdigrise. Plea, not guilty. At the trial, before Abbott C. J. at the *London* sittings after last *Hilary* term, it was admitted on the part of the defendants, that the verdigrise in question was of *English* manufacture, and, therefore, not liable to the payment of any duty. It appeared, however, that it was a very close imitation of *French* verdigrise; the paper, also, in which it was packed, and the string round the packages, being similar to the paper and string in which *French* verdigrise was usually packed. The defendants kept the verdigrise six weeks in their custody, and delivered it to the plaintiff before the action was brought, but in a damaged state, and it was sold by the plaintiff before the trial. The jury found a verdict for the plaintiff, on the second count, for 73*l.* 15*s.* 8*d.*, the plaintiff being precluded from recovering on the first, by the terms of his notice of action; and the Lord Chief Justice certified, under the 28 G. 3. c. 27. s. 24., that there was probable cause for the seizure. By that statute it is enacted, "That in case any action shall be commenced against any person on account of the seizing of any goods forfeited by virtue of the revenue acts, and a verdict shall be given against the defendants; if the Judge before whom such action shall be tried shall certify that there was a probable cause for such seizure, then the plaintiff, besides the thing so seized, or the value thereof, shall not be entitled to above 2*d.* damages, nor to any costs of suit." The plaintiff having entered up his judgment for the damages obtained at the trial, the *Solicitor-General* obtained a rule for setting aside that judgment, and for entering

1822,
—
LAUGHED
against
BAPPY,

ABBOTT C. J. I am of opinion, that the plaintiff is entitled to have judgment and execution for the damages found by the jury. The seizure, in this case, turned out in the result to be unlawful. Now, if the act of parliament had never passed, the plaintiff would have been entitled to recover damages for the injury he had sustained by the seizure and detention of his goods : and the value of them at the time they were seized, together with any loss he might have sustained by the seizure and detention, would be the measure of his damages. If, therefore, in the course of the cause, the goods had been returned, the plaintiff would still have been entitled to proceed for further damages. The act of parliament, in this case, deprives the plaintiff of his right to recover damages in respect of the seizure and detention of the goods ; but expressly reserves to him the right of recovering the thing seized, or the value thereof. I am of opinion, that the value thereof means the value at the time of seizure, and not the value at the time when the goods are returned ; and there being nothing to shew that the plaintiff accepted the verdigrise itself in full satisfaction, I think that he is entitled to have the difference between the value of the verdigrise at the time of seizure and the time when it was returned to him ; and that, being so, this rule must be discharged with costs.

Rule discharged with costs.

1822.

LAUGHED
against
BLAFFF.

plaintiff in the action. The tenant had held the premises in question, which were of the annual value of 20*l.* under the lessor of the plaintiff, *for three months certain*, by virtue of an instrument in writing, which was annexed to the affidavits in support of the rule, and was not stamped.

1822.

Dox dem.
PHILLIPS
against
Row.

D. F. Jones shewed cause. Here, as the agreement is not stamped it cannot be received in evidence, and then it does not appear at all that the defendant holds by an agreement in writing. The intention of the act was not to make any difference as to the admissibility of unstamped instruments, but to leave any objections as to the admissibility of evidence in the same situation, upon applications under this statute, as they would have been if the cause had been tried at Nisi Prius. If this had been an agreement only, it might have been doubted, whether, inasmuch as the subject matter was altogether less than 20*l.*, the instrument required any stamp; but this instrument, though called an agreement, enured in point of law as a lease, and therefore required a stamp, within 55 Geo. 3. c. 184., schedule part 1. Secondly, the case is not within the act of parliament, which applied only to cases of a demise for any *term or number of years*. Now here, the tenant held only for *three months*, and, indeed had only engaged for that term. The words in the statute must be read, term of years or number of years; otherwise a taking for a week might be considered to be a term, and might expose the tenant to all the expensive proceedings authorised by this act. If a different construction is to prevail, the insertion in the first section of the act, after the words "for any term," of the words "*or number of years certain, or from*

year

BAYLEY J. I am also of opinion that the case is within the act of parliament. It is a very beneficial statute to landlords, where the tenant has really no defence, and it may be also beneficial to tenants, in saving them from fruitless expense.

1822.

Due dem.
PHILLIPS,
against
ROZ.

HOLROYD and BEST Js. concurred.

Rule discharged. (a)

(a) See *Litt. &c. 67.* and *Co. Litt. 54. b.*

JONES against WOOLLAM.

DEBT on bond to the plaintiff, treasurer of a friendly society, &c. The condition set out on oyer was for the payment of a sum of money to the plaintiff, or his successor, treasurer of the friendly society above named, or the executors or administrators of the plaintiff. Plea, that the bond was executed by the defendant to the plaintiff, as treasurer of the society, and for the use and benefit of the society, and for no other cause or consideration whatever, and that the rules, orders, and regulations by which the society was governed, had not been exhibited, confirmed, or filed, at the quarter sessions, pursuant to the statute 33 G. 3. c. 54. To this plea there was a general demurrer.

Debt on a bond given to plaintiff as treasurer of a friendly society. Plea, that the rules of the society had not been confirmed at the quarter sessions pursuant to 33 G. 3. c. 54.: Held upon demurrer that the plea was bad, the bond being a good bond at common law.

Storts, in support of the demurrer, was stopped by the Court.

shall have expired or been determined by a notice to quit." I think the words, "under a lease or agreement in writing," apply to the whole sentence, and are not confined to the case of a tenant holding for a number of years certain.

1822.

 Doc.
John
Rox.

Rule refused.

The KING against HIGHMORE.

QUO warranto against the defendant for using and exercising the office of bailiff or sub-bailiff of the borough of Milbourne port, in the county of Somerset. To this information the defendant pleaded several special pleas. The bailiff was the returning officer of that borough. *Mercwether* in last term obtained a rule to discharge the rule to plead several matters, and for striking out all the defendant's pleas except one, on the ground that this was not a corporate office, and therefore, was not within the 9 Anne, c. 20., and he cited *Rex v. Richardson*. (a) And *Gaselee*, contra, had obtained a rule nisi for quashing the information, on the ground, that if this did not fall within 9 Anne, c. 20., the information itself could not be supported. Both rules were ordered to come on together.

An information in the nature of a quo warranto may be granted at common law within the 9 Anne, c. 20., against a party for exercising the office of a bailiff in the borough of M. although it was not a corporate office.

Quare, whether in such a case the defendant may plead several matters.

Scarlett, Adam, and Mercwether for the crown, in support of their own rule, cited, in addition to *Rex v. Richardson*, the cases of *Rex v. Wallis* (b), *Rex v. Williams* (c) and *Buller N. P. title Mandamus*, 204. 211.

(a) 9 East, 169.

(b) 5 T. R. 375.

(c) 1 Burr. 402.

statute 9 Ann. c. 20.; and that, too, in a case in which it is open to the defendant, by writ of error, to raise the point. That rule must, therefore, be discharged. On the same principle we shall proceed with the other rule. If we make it absolute, we shall altogether prevent the defendant from setting our judgment right by writ of error; but if we discharge it, and the defendant pleads double, the error will be on the face of the record, and then the prosecutor may take the case ultimately before a higher tribunal.

1822.

The KING
against
Hesemann.

Both rules discharged.

Note. The prosecutor did not demur, but filed replications to all the pleas.

The KING against ROGERS.

Monday,
May 20th.

SCARLETT had obtained a rule nisi for a certiorari to remove an order of Sessions, of the town and county of *Nottingham*, confirming a warrant of distress, signed by two magistrates, for enforcing the payment of wages, said to be due from *Thomas Kay* to *William Rogers*, for work done by the latter in the silk manufacture and the cotton manufactory. The wages, for which the warrant issued, had been paid previously in goods, which payment the magistrates altogether disallowed. The Sessions, on appeal, considered the point of law so doubtful, that they confirmed the order, subject to a special case. The question was, whether the certiorari was taken away.

The 17 G.
c. 56. &c. 22.
takes away
the writ of
certiorari
only from
offences for the
first time cre-
ated by 22 G. 2.
c. 27., and does
not apply to
those created
by 12 G. 1.
c. 34., and ex-
tended to the
silk and cotton
trades by
22 G. 2. c. 27.

Deman shewed cause. There is no authority to issue a certiorari in this case. By 12 G. 1. c. 34. s. 8.

the general rule is to issue a certiorari to clothiers

etc. etc.

c. 34. were extended to the silk and cotton trade. Now, I think that the best construction we can give to the 17 G. 3. c. 56. s. 22., on which this question turns, will be to hold, that it extends only to the offences created for the first time by the 22 G. 2. c. 27. If so, the writ of certiorari, in the present case, is not taken away.

1822.

The King
against
Bexams.

HOLROYD J. concurred.

Writ of certiorari granted. (a)

(a) See 17 G. 3. c. 56. s. 20.

The KING against The Inhabitants of OAKMERE. *Monday,*
May 20th.

TWO justices, by their order, dated April 1st, 1821, removed John Bradford from the township of *Over Tabley* to the township of *Oakmere*, both in the county of *Chester*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case. The township of *Oakmere* was before, and until the passing of a certain act of parliament in the 52d year of his late majesty, part of the forest of *Delamere*, in the county of *Chester*, and an extra-parochial place. Under and by virtue of the said act, intitled, "An act for inclosing the forest of *Delamere*, in the county of *Chester*," the forest was, in December, 1819; duly divided into four separate townships, of which *Oakmere* was one. Since that time overseers of the poor have been duly appointed for the township of *Oakmere*. The pauper, John Bradford, was born many

Where a district previously extra-parochial, was by act of parliament made a township; and it was provided, that from thenceforth it should maintain its own poor and repair its own roads, and have the like powers, privileges, and immunities, and be subject to the same regulations as other townships within the county: Held, that this clause was prospective only, and that a bastard born within the district previously to passing the act was not settled there.

Nozam, in support of the order of Sessions, contended, that the section of the local act was retrospective, and that all acts done within the local limits of *Oakmere*, which would have conferred a settlement elsewhere, were sufficient for that purpose to confer a settlement in *Oakmere*, after that place became a township. That is always the case where overseers are appointed for a vill, although no such overseers have ever been appointed before. Here, too, the clause makes them liable to the repair of roads, which must obviously extend to roads antecedently existing.

1822.
—
The King
against
The Resident
and of
Oakmere.

J. Williams, contra. In the case of a vill, it must have been so for time immemorial; and, therefore, it was, during all that time, a place where legally a settlement could be gained. But, here, it is made a township *de novo*. As to the roads, they were existing in *Oakmere at the time* it became a township, as well as before, and they, therefore, do not fall within the same reason as antecedent settlements, which had no such existence. The act must, as to the latter, be prospective; for, otherwise, injustice would follow. In this very instance, the mother of the pauper, at the time he was born, must have been removable to her own settlement elsewhere. But, being in an extra-parochial place, she could not then, for that reason only, be removed.

Cur. adv. vult.

And now, on this day, the judgment of the Court was delivered by

ABBOTT C. J. This case arises on the act 52 Geo. 3. for enclosing the forest of *Delamere*, and the question is,

if the district had been previously a township, the inhabitants might have taken care to prevent the burthen from falling upon them, as by the removal of unmarried pregnant women, or of persons coming to settle on tenements under 10*l.* a-year, especially before the stat.

35 Geo. 3. c. 101. The latter, indeed, would not acquire a settlement for themselves, but settlements might be derived under them by apprentices and servants. And this is not like the case of a modern appointment of overseers to places that formerly had no such officers; because all such places must have been wills from time immemorial, and consequently under a legal obligation to maintain their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do. The consequence of this opinion is, that both the orders must be quashed.

1822.

The King
against
The Inhabit-
ants of
OAKMEAD.

Both orders quashed.

on which he might or ought to have in him by virtue of the said indenture. And the said *John Greasley* covenanted with the said *Thomas Dalby*, that he, the said *Samuel Blockley* should, notwithstanding any thing to be done by *Greasley* during the said term of years, well and truly serve the said *Thomas Dalby* as his master, &c. Provided, that the said *Thomas Dalby* shall well entreat and use him, and learn him the craft, mystery, and occupation of a frame-work knitter; and should also allow him sufficient meat, &c. which the said *Thomas Dalby* agreed to do in consideration of the services of the said apprentice; and also, the sum of 5*l.* agreed to be paid by *Greasley* to *Dalby*, being the said sum of money, which he, the said *John Greasley* received with the said apprentice, from the churchwardens and overseers of *Heather*, on their putting and placing him, the said *Samuel Blockley*, apprentice to the said *John Greasley*. It was objected by the respondents, that this assignment was not made under the 32 G. 3. c. 57. with the consent of two magistrates in writing; and therefore, was not an instrument under which a settlement could be gained. The appellants contended, that it was a valid instrument to confer a settlement, and cited the 56 G. 3. c. 139. s. 9. which passed subsequently to the assignment. The case was argued on a former day by

Phillipps and *Durriss*, in support of the order of sessions. This was not a valid assignment of the apprentice not having been made with the sanction of two justices. The 32 G. 3. c. 57. s. 7. provides, that it shall be lawful to make assignments in writing, of parish apprentices by consent of two magistrates. And this is compulsorily, it being for the benefit of the apprentice, that a controul of this sort should be exercised. It is argued,

1822,
—
The King
against
The Inhabit-
ants of
BARTON.

And now, on this day the judgment of the Court was delivered by

ABBOTT C. J. We are of opinion that the pauper gained a settlement in the borough of *Leicester*, and, consequently, that the rule must be made absolute for quashing the order of removal, and the order of sessions confirming the same. The assignment of the apprentice and the service to his new master, were prior to the prohibitory statute 56 Geo. 3. c. 139, and, therefore, are not affected by it. The prior statute 32 Geo. 3. c. 57. s. 7. is not a prohibitory but an enabling statute. Before that statute, a master could not discharge himself from the obligation to maintain a parish apprentice, by assigning him to another person, nor were the apprentice and the new master subject to the ordinary jurisdiction of the justices, with respect to masters and parish apprentices. This appears by the preamble to the section, and then the act proceeds with certain enactments, whereby if the terms are complied with, these inconveniences are remedied. If the terms are not complied with (and in the present instance they were not) the case is not within that statute; but it is to be considered, with regard to the law, as it stood before that act was passed. And so considered, although the assignment may be for many purposes inoperative, yet it manifests a consent of the first master to a service with the second, and renders that service a service under the original binding. This is established by the cases of *Rex v. The Inhabitants of East Bridgford* (a), and *Rex v. The Inhabitants of St. Peter's*. (b) In the first

1822.

The KING
against
The Inhabit-
ants of
BARTON.

(a) *Burr. S. C.* 153. 2 *Boll.* 407. *S. C.*(b) *Ibid.* 248.

1822.

Doe on the Demise of JOHN GILLARD against
RICHARD GILLARD.

EJECTMENT for freehold lands, situate in the parish of *West Alvington*, in the county of *Devon*. At the trial, before Graham B., at the *Devon Summer assizes*, 1821, a verdict was found for the defendant, subject to the opinion of the Court on the following case:

John Gillard, the lessor of the plaintiff, was the heir at law of *Richard Gillard*, his uncle, deceased, who, at the time of making his last will, and at the time of his death, was seised in fee-simple of several freehold and leasehold tenements; that is to say, of a certain freehold tenement, consisting of a dwelling-house and garden, with the appurtenances, called *Greenhill*; two other distinct freehold tenements, the one consisting of three cottages and gardens, with the appurtenances; and the other of four cottages and gardens, with the appurtenances; and a small leasehold garden near to the tenement, called *Greenhill*; all situate in the parish of *Dodbrooke*, in the county of *Devon*; six acres of land,

cupation all the land in the parish of *W.*, the freehold lands in the parish of *S.*, and leasehold lands near the village of *B.*; but the freehold lands in the parish of *D.* were in the occupation of tenants. Before the making of the will, *A.* had contracted to sell all the lands in the parish of *S.*, and the leaseholds near the village of *B.*. The amount of *A.*'s debts at the time of his death exceeded his personal property. *A.*, shortly before his death, made a will as follows: "I direct my debts, legacies, and funeral expenses, to be paid; with the due payment whereof I charge my real estates. I give to my nephew, *T. G.*, 700*l.*, to be paid by my executor; and to my nephew, *J. G.*, (the heir at law) 20*l.*, to be paid by my executor; and, lastly, I constitute *R. G.* my sole executor of all my lands for ever, and all my leasehold property here or at *B.*, or money that shall become due for the same, paying certain annuities thereout by half-yearly payments." Held, that by this will the executors took a fee in the freehold lands in the parish of *W.*

the time of his death, exceeded his personal property. On the 6th day of September, 1819, *Richard Gillard*, the uncle, made his last will, duly executed so as to pass real estates, as follows: "First, I will and direct that all my just debts, legacies, and funeral expenses, shall be fully paid and discharged; and with the due payment whereof I do hereby subject and charge all my real estates, messuages, lands, and tenements; first, I give and bequeath unto my nephew, *Thomas Gillard*, of *Highweek*, 700*l.*, to be paid by my executor; likewise, to my nephew, *John Gillard*, the sum of 20*l.*, to be paid by my executor; I give mortgage of *Bartleek's* house to *Richard Gillard*, my executor; lastly, I do make, constitute, and appoint *Richard Gillard* my whole and sole executor of all my lands for ever, and leasehold property, here or at *Beeston*, or money that shall become due for the same, paying *Maria Bartlett* 12*l.* per annum, by half-yearly payments: and my sister *Elizabeth* 20*l.*, by half-yearly payments. I give 50*l.* due from my brother's will to me, to my executor." *John Gillard* and *Richard Gillard*, mentioned in the will, were the plaintiff and defendant.

The case was argued on a former day in this term by *Carter* for the plaintiff, and *Adam* for the defendant. The cases of *Clements v. Cassey*(a), and *Piggott v. Penrice*(b), were cited for the plaintiff. The arguments on both sides were so fully reviewed in the judgment of the Court, that it is unnecessary to report them.

Car. adv. vult.

And now on this day the judgment of the Court was delivered by

(a) *Noye Rep.* 46.

(b) *Rec. Ch.* 471.

1822.

Def. decd.
GILLARD
against
OLLAISON.

fore, have been intended as a fund for the payment of them. This gift manifestly includes some part of the freehold estate; the question is, whether it includes the freehold at *West Alvington*, which was formerly parcel of the manor of *Dodbrooke*, and purchased by the testator as such, and which was in his own occupation, and at no great distance from his residence. The words of the gift are these: “ I do make, constitute, and appoint *Richard Gillard* my whole and sole executor of all my lands for ever, and leasehold property, here or at *Beeston*, or money that shall become due for the same, paying, &c.” The words “ or money that shall become due for the same,” manifestly relate to the contract whereby the testator had engaged to sell his freeholds at *Stokenham*, and leaseholds in and near *Beeston*, which is in the parish of *Stokenham*, for the single and undivided sum of 2040*l.*; and it is clear, that whatever restriction, if any, be found in the words “ here or at *Beeston*,” as to the first member of the sentence, must be applicable to the latter member also; so that if there be any freehold not under contract for sale to which the gift will not extend, neither will the gift extend to the freehold which was under contract for sale: and in this view of the subject, the executor will not be able to convey to the purchaser the freeholds at *Stokenham*, nor be entitled to receive the value of those freeholds, but there must be two conveyances, and also a division of the price. The will, however, makes no provision for such a division, and the testator manifestly never thought of it, nor contemplated its occurrence. The intention of the testator being, as we think, thus manifested, it has been contended, that effect may be given to it, first, by considering the words “ here or at *Beeston*” as relating only to the leasehold property; or, secondly, by con-

1822.

**Doc dem.
GILLARD
against
GILLARD.**

confined to the last antecedent, viz. "my leasehold property," and are not to be extended to the more remote antecedent, "my lands for ever:" for the gift those words contain is complete and perfect in itself, and does not require any other words to give effect to it, for the purpose of denoting either the thing given or the intended donee, and may, therefore, in furtherance of the manifest intention, be taken by itself, not qualified or restrained by the words that afterwards occur. For these reasons, we think the defendant is entitled to retain the verdict; and the postea must be delivered to him.

1822.

Doe deo.
GILLARD
against
GILLARD.

Judgment for defendant.

Rex against Dugger.

*S*ELWYN had obtained a rule nisi for a habeas corpus, to bring up the body of the defendant, on the ground of a defect in the warrant of commitment. It appeared that the defendant was in custody under a warrant of the sheriff of Cornwall, issued by virtue of a writ de contumace capiendo, and commanding the officer "to attach *R. Dugger*, until he shall have made satisfaction for manifest contumacy, and contempt of the law and jurisdiction ecclesiastical, in not obeying his majesty's lawful commands, by paying, on a day now long past, to *J. J. Austen*, or to his proctor, 20*l. 8s. 5d.*, being the amount of costs taxed in a certain cause of appeal and complaint of nullity, lately depending in the Arches Court of Canterbury, between

A warrant issued in pursuance of a writ de contumace capiendo stated that the defendant was attached for non-payment of costs in a cause of appeal and complaint of nullity lately depending in the Arches Court of Canterbury: Held, that this warrant was insufficient in not stating with certainty the nature of the cause, so as to shew that it was one apparently

within the jurisdiction of the Ecclesiastical Court,

this general form. As to the second objection, the addition is only required by statute 5 Eliz. c. 23., and the provisions of that statute are not to be followed, unless the suit be for one of the nine causes there stated. And so it was held in *Regina v. Sangway*. (a) Besides, here, the defendant is described as "cooper" in the significavit, and it is therefore most probable, that this description is followed in the writ itself, though it does not appear on the warrant.

1822.

The King
against
Ducane.

Selwyn, contra. This may, for any thing that appears, have been a suit for one of the nine causes in the statute; and then, it is clear, an addition would be necessary. But the first is the main objection. Here the statement is much too loose and uncertain. In *Rex v. Fowler* (b) the return was, that the defendant was imprisoned, under a writ de excommunicato capiendo, for certain causes of subtraction of tithes, or other ecclesiastical rights; and it was quashed, on the ground, that the "other rights" might be matters out of the jurisdiction, and that it ought to be shewn that the matters were within the jurisdiction; for, of that the king's courts were to be judges. *Regina v. Hill* (c) is an authority to the same effect. And in *Regina v. Dr. Watson* (d) it was held to be necessary to shew the nature of the suit in the Court below, in order that this Court might award the proper process; which varies according as the suit below is or is not for one of the nine causes mentioned in the statute 5 Eliz. cap. 23., and in that case the pro-

(a) 1 *Salk.* 29.(b) 1 *Salk.* 295.(c) 1 *Salk.* 294.(d) 2 *Ld. Raym.* 817.; and see same case, 7 *Modern*, 56., where it appears clearly that that was the case of an appeal.

since found the case of *Rex v. Eyre* (*a*), where the suit appeared from the significavit to have been an appeal and complaint of nullity, which is exactly similar to the present. And in another case, of the same name (*b*), two significavits were quashed, being only said to be in a cause of appeal concerning a matter merely spiritual; and Lord *Talbot* is there reported to have said, "We are not to lend our assistance, but where it appears clearly that they have jurisdiction, and are not to trust them to determine what is a matter merely spiritual." Upon these authorities, which are not distinguishable from the present, we think that it does not sufficiently appear here, that this was a writ issued in a cause within the jurisdiction of the ecclesiastical court; and that the rule for a habeas corpus ought to be made absolute.

1822.

The KING
against
DUGGER.

Rule absolute. (c)

(*a*) 2 *Sir.* 1189. (*b*) 2 *Sir.* 1067.

(*c*) The defendant in this case was afterwards brought up before a Judge at Chambers and discharged.

c. 19. s. 19. The intention of the 43 *Eliz. c. 6.*, was, to prevent actions being brought in the superior courts, which might and ought to be brought in the county, or other inferior courts. Before the 11 *Geo. 2. c. 19.*, trespass *vi et armis*, was the proper form of action for a distress irregularly conducted; the landlord was then considered a trespasser *ab initio*, and the tenant was entitled to recover the full value of the goods distrained. The action of trespass *vi et armis* could not have been maintained in the county court, that court having no power to assess a fine. (a) The fair inference then is, that the legislature did not intend the action given by the 11 *Geo. 2. c. 19. s. 19.* in lieu of the former remedy, by action of trespass, to be brought in the county court, where the former remedy could not have been had. Besides, that statute gives the plaintiff his option of an action of trespass, or on the case; and the power given to him of bringing trespass, seems to shew that it was not intended the action should be brought in the inferior court. Further, the statute in question expressly gives *full* costs of suit, and it gives different directions as to the costs to be recovered in certain specified cases. When, therefore, in the clause in question *full* costs are given, it must be taken to be costs of increase, and not mere nominal costs; and there is good reason for this construction, for, before the statute, the plaintiff would have recovered the full value of the goods, which would, in almost every case, exceed 40s., and, therefore, the Judge would have had no power to certify. The statute 11 *Geo. 2.*, while it limits the damages to be recovered to the amount of the injury consequent upon the irregu-

1822.

 LEWINE
against
REDDISH.

(a) 2 Inst. 311. 4 Inst. 266.

REGULA GENERALIS.

Easter Term, 3 Geo. 4.

To prevent unnecessary expense to plaintiffs suing in this Court, in case of notice given by prisoners of their intention to apply for their discharge under any act made for the relief of insolvent debtors, It is ordered, that after such notice given to any plaintiff, no prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of this Court, from the time of such notice given until some rule or order shall be made in the cause in that behalf by this Court, or one of the Judges thereof.

And it is further ordered, That a copy of this rule shall be hung up in the King's Bench prison, in the place where rules of this Court are usually hung up.

By the Court.

C A S E S

ARGUED AND DETERMINED

1822.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Third Year of the Reign of GEORGE IV.

JOHN JAMES BEARD against WESTCOTT, JOHN-
SON (a), JOHN CARUTHERS, THOMAS COMBES
and MARY his Wife, JOHN CARUTHERS the
Younger, an Infant, MARY ANN COMBES,
and ELIZABETH COMBES, Infants.

THE following case was sent by the Lord Chancellor Devise to *A.* for 99 years, if he should so long live; remainder to his first son, then to the second and other sons successively for 99 years only, in case he should so long live; and that such elder son, or the issue of such elder son, should have no greater estate than for 99 years, determinable at his decease; and if there should be no issue male of *A.* at the time of his (*A.*'s) death, or in case there should be such issue male at that time, and they should all die before 21 without issue male, then to *B.* for 99 years, if he should so long live; remainder to the first son of *B.* for 99 years, if he should so long live, &c. Held, that *A.* took under the will an estate for 99 years in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue, and that, upon his death, his first son would take an estate for 99 years in the freeholds, determinable with his life, and the remainder of the terms in the leaseholds: but, that the limitations to the second and other unborn sons of *A.* were void as tending to perpetuity; and the limitations over to *B.* &c. after these void limitations, were not accelerated, but were void also.

(a) Westcott and Johnson were guardians of the infants.

1822.

 Beard
against
Warren

lawful issue male, then there were similar limitations over to *Joseph Beard* (the brother of *John James Beard*) and his sons, and issue male, with a similar gift over, in case there should be no issue male of *Joseph Beard*, &c., to his granddaughters, *Elizabeth Beard* and *Mary Beard*, sisters of *John James Beard* and *Joseph Beard*, and their assigns, to receive and take the rents, issues, and profits thereof, to their sole use and benefit (whether sole or covert) as tenants in common, and not as joint-tenants, during the term of 99 years, if they should so long live, and after their respective deaths, then to the first and other son and sons of their respective bodies, to receive the rents of the said premises, according to the respective interests of their mother, father, or grandmother, for the term of 99 years only, in case they should so long live, and so on toties quoties for ever; and in case there should only be one son of the bodies of *Elizabeth* and *Mary Beard*, then to such only son and his assigns, during the said term of 99 years, if he should so long live, and immediately after his decease, then to the first son of that son and his son, for the like term of 99 years only, if he should so long live; and that no issue male of his said granddaughters, or their respective issue, should take any greater estate or interest therein, than for 99 years at any one time, and so on for ever. There were similar limitations over, in like manner, to daughters of his four grandchildren. Then he gave another estate in like manner, giving the preference to *Joseph Beard*, and his issue. Then he gave another estate to *Elizabeth*, and her assigns, for 99 years, in case she should so long live; and after her decease, he gave the same to all and every the children of *Elizabeth* that should be living at the time of her

take in the freehold estates, and what estate and interest in the leasehold estates under the testator's will?

Secondly, whether all or any, and which of the limitations in the testator's will subsequent and expectant upon the limitation to *John James Beard*, for 99 years, if he should so long live, were void and contrary to law; or whether any, and which of such limitations were good and effectual, and particularly with reference to the circumstance that the limitations over (in the event of there being no son or sons of *John James Beard*, nor issue male of such son or sons living at the death of the said *John James Beard*, or there being such issue male at that time, they should all die before they attained their respective ages of 21 years without lawful issue male,) were to take effect at the end of a term of 21 years after a life in being, at the death of the testator, without reference to the infancy of the person intended to take, and to the circumstance that there might be issue of *John James Beard* living at his death to whom the estate was given by the will, for whose death, under 21, the limitation over in the event before mentioned, must await. This case was argued at the sittings before last *Michaelmas* term by

Sugden, for the plaintiff. There are two questions in this case; first, whether a gift for twenty-one years in gross, after a life in being, without reference to the infancy of the person who is to take, is void, as tending to a perpetuity; and, secondly, assuming the gift to *Joseph Beard*, standing by itself, to be valid, whether it and all the other limitations over, after the gift to the first unborn son of *John James Beard*, are not void. Here the gift is to *John James Beard* for 99 years, if he shall so long live, and, after his decease, the second gift is to

1822.

 BEARD
against
WESTCOTT.

time, and they should all die, before they attain 21, without lawful issue male, the estate is to go to *Joseph Beard*, and his sons. There is no case in which it has been held that an executory devise may be limited to take effect 21 years after a life in being, without reference to the birth and infancy of the devisee who is then to take. The reason why 21 years and a few months are in such cases allowed as the period during which an estate may be unalienable is, in *Stephens v. Stephens* (*a*), expressly stated to be, that strictly the power of alienation would not be restrained longer than the common law would otherwise restrain it, viz. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity. In *Long v. Blackall* (*b*), Lord *Kenyon* says, "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the Courts have said that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age, the estate is unalienable." In *Crooke v. De Vandes* (*c*), a legacy given to the nephews and nieces of the testator, if at the end of 30 years from his decease neither of his two grandsons (both living) had any grandchild living, was considered to be too remote, and therefore void. In *Thelluson v. Woodford* (*d*), Lord *Alvanley* said, "As to the period of 21 years, it has never been considered as a term that may at all events be added to an executory devise or

1822.

 Beard
against
Westcott.

(*a*) *Cas. temp. Talb. Forrester*, 232. *Vivian's MS. Lincoln's Inn Library.*
 (*b*) 7 *T. R.* 102. (*c*) 9 *Yer. jun.* 197. (*d*) 4 *Yer. jun.* 337.

of persons incapable of taking; yet notwithstanding they exist, he should take as if it was well appointed to them; and they had failed. It is given upon a contingency, upon which there was no right to give it." *Crompe v. Barrow* (a) is distinguishable from this case. There the gift was in the alternative, viz. to an object of the power in one event, in another not to an object of the power, and it was held, that on the happening of the former event, the gift was good. The power was to appoint to children, and the appointment was as to a moiety to a daughter, and as to the other moiety to a son for life, and upon his death, for his wife and children, and in case he should die without leaving a wife or child, then as to that moiety, to her daughter. And it was determined, that although the appointment to the wife and daughter was void, yet that as the event did not happen upon which that gift was to take place, it did not defeat the limitation over to the object of the power in the event provided for, and which did happen of the son's dying without leaving a wife or child surviving him. The same observation applies to the case of *Longhead v. Phelps*. (b) If indeed, the limitations over were not wholly void, this consequence would follow, that there might be a person in esse entitled to take according to the words of the first limitation in the will, but incapable in law, and a remainder-man in esse capable of taking by law, but incapable of taking, because the contingency has not happened which was to determine the preceding estate. As for example, suppose the gift had been to J. J. B. for 99 years, if he should so long live; remainder to his first son for 99 years, if he should so long live; remainder over in like manner to his issue successively; remainder to the other sons and their

1809.
Brock
against
Wrightson

Phelps, and there was no instance in which a limitation after a prior devise which was void from the contingency being too remote, had been let in to take effect; but the contrary was expressly decided in the House of Lords, in the case of *The Earl of Chatham v. Tothill*. (a) Although, therefore, no son was born, the devise over was held void.

1822.

 BILLS
against
Westm.

Preston, contra. The 39 and 40 G. 3. c. 98., which passed in consequence of the case of *Thellusson v. Woodford* (b), may be considered as containing a legislative declaration of the law upon the head of objection, namely, the term of 21 years; for that statute keeps within the boundary of the rule. It enacts, that no person shall, by deed, will, or otherwise, settle or dispose of any real or personal property, so that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated, for any longer term than for the life or lives of such grantor, settlor, devisor, or testator, or the term of 21 years from the death of any such grantor, settlor, devisor, or testator, or during the minority of any persons who shall be living, or ex ventre sa mere, at the time of the death of such grantor, &c., or during the minority of any person or persons, who, under the uses or trusts of the deed, will, or other assurances, directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest or annual produce so directed to be accumulated." This is a legislative declaration that property may accumulate during a life in being, and 21 years after the death of the grantor, &c. A new qualification is now

(a) 6 Bro. Ch. Ca. in Parl. 451. (b) 4 Ves. jun. 227.

within a reasonable time was good, and that 20, nay 30 years had been thought a reasonable time. So it is, if within the compass of a life or lives, for let the lives be ever so many, there must be a survivor, and it is, at the utmost, only the length of that life; and *Lawrence J.*, in *Thelluson v. Woodford* (*a*), lays down the same rule. In *Gee v. Audley* (*b*) there was an appointment by will of 1000*l.*, in default of issue of *Mary Hall*, equally to be divided between the daughters living, (viz. at the failure of issue) of *John Gee* and *Elizabeth* his wife. Lord *Kenyon* said, "that neither real nor personal estate can be so settled as to be tied up beyond lives in being, and 21 years and a few months afterwards; that if the expression in that will had been daughters "now living," or "living at my death," it would have been good; but that as it stood, it might be to those born afterwards. The vices of this gift were the contingency, and the possible suspense for more than 21 years after the death of a life in being.

Secondly, Assuming the limitations to all the unborn sons except the first, are void, then the limitation to *Joseph Beard*, and the subsequent limitations, as far as they are within the compass of the rules against perpetuities, are accelerated, and *Joseph Beard* was entitled to take immediately on the determination of the estate limited to *John James Beard* and his first son. Besides, even though this gift be in itself too remote, and therefore void as far as it is by way of remainder, it may be good and have effect in the contingency which is expressed, being an event which is within the limits of the rule against perpetuities. In *Longhead v. Phelps* (*c*), a trust of a term to arise on a contingency, that *A.* and *B.* should

1822.

 BEARD
against
WESTCOTT.

(*a*) 4 *Ves. jun.* 313. (*b*) 2 *Ves. jun.* 365. (*c*) 2 *Sir W. Black.* 704.

at law of *John James* the testator, took, under the said testator's will, an estate for 99 years, determinable with his life, in the freehold estates devised to him, in the first instance; and also in the leasehold estates devised, if they should so long continue, and that, upon his death, leaving one or more sons, his first son will take an estate for 99 years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. We are also of opinion, that all the limitations subsequent and expectant upon the limitation to the first son of *John James Beard*, are void.

1822.

 BEARD
against
WESTCOTT.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

KILSBY against WILLIAMS and Others.

Saturday,
June 8th.

ASSUMPSIT upon the usual money counts and an account stated. Plea, general issue. At the trial at the Guildhall sittings after last Easter term before Abbott C. J., it appeared that the defendants were the bankers, both of the plaintiff and one Robertson, and that on the 13th November, 1821, the plaintiff paid in at

A plaintiff paid into his own bankers, a cheque of 250*l.* drawn upon them by a third person, which they received without any objection; and in the course of the same day the drawer of

the cheque paid in a sum of money, part of which he particularly appropriated, leaving a balance unappropriated of 237*l.* The bankers, who were then creditors of the drawers to a large amount, wrote on the next morning, to the plaintiff stating, that the cheque was not paid, but that they would keep it in the hope of there being money to pay it; and on that day a further unappropriated balance was paid in, making altogether a sum exceeding the plaintiff's cheque: Held, that, under these circumstances, the plaintiff might maintain money had and received against the bankers, and that the latter, being his agents for receipt of the money, could not appropriate the balance to the payment either of their own general account against the drawer, or of two cheques presented on the same day, but subsequently to that of the plaintiff, and paid by them.

the

Campbell moved for a new trial, and contended, that here there was no specific appropriation by *Robertson* of this money, to the payment of the plaintiff's cheque, and therefore, the defendants had a right to appropriate the balances of 287*l.*, and 93*l.* to the reduction of their own account. *Williams v. Everett.* (a) In *De Bernales v. Fuller* (b), the money was specifically paid in to discharge a particular bill; and therefore, the Court held, that an action would lie against the bankers there, who being the persons with whom the bill was deposited, were to be considered as the holders' agents for receiving the money due upon it. But that is not the case here. The promise in the defendants' letter, that they would hold the cheque in the hope of there being money to pay it, could only mean that they would keep it, and when their own balance was discharged, would appropriate the next money paid in by *Robertson*, to the discharge of this cheque. But, secondly, they had a right to take into account, the two cheques for 50*l.* paid on the 13th, and then, even if the balance of the 14th be added, there will only be a balance of 230*l.* in their hands. And, unless they had the full amount of 250*l.* in their hands, they were not bound to pay the cheque. Now it is clear, they had a right to deduct the payments of the two cheques for 50*l.* For they were paid prior to the letter written by the defendants, and were part of the charges of the day to which the sum of 1579*l.* was subjected. And the circumstance of their being paid in subsequently to the one for 250*l.* cannot affect the question. Till the end of the day the bankers could not tell whether the cheque for 250*l.* would be honoured

1822.

 KELSBY
 against
 WILLIAMS.

(a) 14 East, 582.

(b) 14 East, 590.

honoured, or not, according to the course of *Robertson's* dealing with them in that day. Now, on that day *Robertson* discounted with them bills to the amount of 1579*l.*, which sum he directed should be applied to the charges of that day, and after providing for the three *Manchester* bills, there remained, unappropriated, the sum of 237*l.* So the account stood on the 13th, exclusive of the two cheques of 50*l.* each, which the jury have found were presented subsequently to the cheque in question. And if the balance, instead of being 237*l.*, had exceeded 250*l.*, I should have had no doubt that the defendants were bound to appropriate it to the payment of the plaintiff. For when they received the cheque from him, they became his agents to receive the money upon it as early as possible, and if they could be allowed to appropriate the money received by them to the payment of subsequent cheques, it would be doing great injustice and injury to their own customer. But I doubted at the trial, whether they would be bound to pay the cheque in part. On the 14th of November, however, a letter is written by them, in which they state that the cheque was not paid, and that they would keep it in the hope of there being money to pay it. In the course of that day money was paid in, part of which was specifically appropriated, leaving a balance unappropriated of 93*l.* This sum being added to 237*l.*, exceeds the amount of the cheque in question; and I think, that under these circumstances, the defendants were liable to pay it, in preference both to the two of 50*l.* each, and to their own balance. I am therefore of opinion, that the verdict is right.

1822.

*KILBY
against
WILLIAMS.*

HOLBOYD J. I am of the same opinion. The bankers receive this cheque from the plaintiff without any objection, and they were, therefore, bound, as agents for the plaintiff, to apply in payment of it the first monies received from *Robertson*, not specifically appropriated by him to the payment of other demands. And I think, therefore, that they were bound to pay it in preference to other cheques, subsequently presented, and also to the balance due from *Robertson* to themselves.

1822.

 KILBY
against
WILLIAMS.

BEST J. As to the balance of 93*l.*, it is clear that the defendants were bound to apply that in payment of the plaintiff's cheque, in consequence of their own letter, by which they undertook, on the 14th, to apply any money coming in for that purpose. As to the other sum of 23*l.*, I entirely concur in the opinion pronounced by the rest of the Court.

Rule refused.

BULMER against MARSHALL, Garnishee.

 Saturday,
June 8th.

NORTON, in last *Michaelmas* term, had obtained a rule nisi for a writ of procedendo, to remove back the record of the judgment obtained in the Lord Mayor's court of the city of *London*, by the plaintiff, against the garnishee, the same having been removed into this court by certiorari. The affidavits stated, that the original suit was commenced in *August*, 1818, by the plaintiff, against *Thomas Broster*, and thereupon an attachment was duly issued and laid in the hands of *Marshall*. On the 15th of *May*, 1821, final judgment was given in the

The 19 G. 3.
c. 70. s. 4. is
confined to
those suits in
inferior courts
where the pro-
ceedings are
similar to those
in the superior
courts, and,
therefore, does
not extend to
the case of a
foreign attach-
ment.

the case is clearly within the mischief; for here the defendant, if he were found within the jurisdiction, could be compelled to pay the money; but, in consequence of his not being so, the plaintiff is deprived of his remedy. It is said, that by this the defendant would be deprived of the advantage of coming in, within a year and a day, to dispute the debt. That is not so; for the money, when levied by virtue of an execution out of this court, will be subject to the same conditions as if levied under process from the court below; and if the defendant comes in and disputes the debt, the record may be then removed back by procedendo for that purpose.

1822.

BULMER
against
MARSHALL.

Norton, contra, was stopped by the Court.

ABBOTT C. J. This rule must be made absolute. The statute is confined to those suits in which the proceedings of the courts below are similar to those in this court. It speaks, in the preamble to the 4th section, of persons served with process issuing out of inferior courts, where the debt is under 10*l.* But here the party against whom we are to issue execution is not the original debtor; and the form of the execution issued by this Court is quite different from that in the Lord Mayor's court in the case of a foreign attachment. Upon the whole, I am of opinion that this does not come within the statute, and, consequently, that the writ of certiorari in this case was improperly issued.

Rule absolute.

without knowing any thing of the parties or the circumstances; but *Radford* never represented himself as an attorney, nor had been considered as such. He was well known to be a bailiff, and his offers to his employers had always been to collect debts for them, and (if necessary to sue for them) to employ an attorney. He never looked for any profit upon the law proceedings, but merely payment for the service of the writ. The attorney had no profit beyond the profit usually charged upon suing out the writ; and this he expected the bailiff to receive for him and account for.

1822.

Ex parte
WHITTON.

ABBOTT C. J. Upon the facts reported to us by the Master, we are of opinion that this is not a case within the act of parliament, but at the same time we think that this is a most improper practice. It is the duty of an attorney to communicate with his clients, and to give his attention to their concerns. If a bailiff be allowed to obtain writs in the manner stated in this report, the client will be wholly deprived of that attention which he ought to receive from the attorney; and although this case be not within the statute, still the Court, in virtue of its general jurisdiction over attorneys, have the power of restraining this practice; and if repeated they will be disposed to visit it very severely. But, as this is the first time that such a matter has been presented to the consideration of the Court, we do not think it right to order the attorney to be struck off the roll in this instance; but we think the purposes of justice will be sufficiently answered, by ordering that this rule shall be discharged, on payment of the costs by the attorney.

Rule discharged on payment of costs, accordingly.

and that the property was thereby changed, and that the plaintiff ought to have brought his action against the sheriff for wrongfully selling the goods; and, secondly, that as the goods were in possession of the tenant under a demise, trover would not lie for them during the term. The plaintiff obtained a verdict, but the Lord Chief Justice gave leave to the defendant to move to enter a nonsuit, and

1822.

 FARRANT
against
THOMSON.

Scarlett now moved accordingly. This action is not maintainable against the defendant. Assuming that *Farrant* might have sued the sheriff or the plaintiff in the execution, still, the defendant being a bona fide purchaser without notice under a *fi. fa.*, is not liable. In *Manning's case* (*a*) it was resolved that a sale by the sheriff by force of a *fi. fa.* should stand, although the judgment be afterwards reversed; for the sheriff who made the sale had lawful authority to sell, and by the sale the vendee had an absolute property in the term. In *Doe v. Thorn* (*b*) it was held, that if a sheriff sell a term under a writ of *fi. fa.*, which is afterwards set aside for irregularity, and the produce of the sale be directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff. But, secondly, the goods being in possession of the tenant, under a demise, trover was not maintainable. The tenant was entitled to the use of them during the term, and the landlord cannot, therefore, maintain trover; he can maintain no action, except for waste or injury done to the inheritance. In *Gordon v. Harper* (*c*) the goods leased as furniture were wrongfully taken in execution by the sheriff; and it was

(*a*) 8 Co. 191.(*b*) 1 M. & S. 425.(*c*) 7 T. R. 9.

held,

separated by his own wrongful act, or the act of God, the tenant has no right to the use during his term, but they become absolutely vested in the person who has the next estate of inheritance. They then become his goods and chattels. Here the removal was intended to be permanent, and the chattels, when severed wrongfully, did not thereby become the property of the wrong-doer, but of the landlord.

1922.

FARRANT
against
THOMAS

HOLROYD J. I think trover the proper remedy. The machinery was let together with the mill, and was part of the mill. It was a part of the inheritance until the demise was made; when the demise took place, it continued part of the inheritance of the landlord, and part of a chattel real in the hands of the tenant in possession. By the lease or agreement the tenant has the use, not the dominion, of the property demised; and, therefore, when he separated any part of it, to convert it from a chattel real to a chattel personal, his right of using it was at an end for any legal purpose, that right being only to use it in the state in which it was before. In the case of a lease of a house, if a tenant pulls down any part of it wrongfully, and not for the purpose of repair, so as to constitute waste, the person who has the first estate of inheritance has a right to the materials of which that house was before composed; and I apprehend he has a right to an immediate possession of those materials, in the like manner as he has a right to the immediate possession of timber, where it is severed from the inheritance. In that case, when detached, either by the wrongful act of the tenant himself, or by the act of God, it immediately becomes the goods and chattels of the person entitled to the first estate of inheritance, and the right which had been for some time vested in the tenant

33 years. Declaration then averred, that the plaintiff entered, and that long before and at the time of making the indenture, and whilst the said *John Heaton* was so seised as aforesaid, the occupiers for the time being of the said piece of ground so comprised in the 'said demised premises, and being part of *Sprang's Dairy*, had been used to have and enjoy a certain way from and out of the same piece or parcel of ground, through a certain shed, being also part of *Sprang's Dairy*, into and over the said yard, thence into, through, and along a passage or gateway, unto and into *Oxford-street*, and so from thence back again, into, through, and along the said passage or gateway, unto, into, through, and over the said yard, unto, into, and through the said shed, into the same piece or parcel of ground, for themselves and their servants, on foot and with cattle and carts, and carriages, to go, return, pass and repass, &c., for the convenient use and occupation of the same piece or parcel of ground; by reason wherof, the plaintiff, as the occupier of the said piece or parcel of ground, was entitled to have, use, and enjoy the said way, &c.; yet the defendants put, placed, and deposited divers large quantities of timber, &c. upon certain parts of the said way, by which plaintiff had been obstructed in the use of the said way. In another count it was stated, that *Heaton* was seised in fee of certain premises called *Sprang's Dairy*, (comprising, amongst other things, the piece or parcel of land demised to the plaintiff,) together with a certain yard therunto belonging, and being so seised, by indenture made, &c. demised, leased, and set unto the plaintiff, the said last-mentioned piece or parcel of land, amongst other premises, with the appurtenances, together with a certain way for himself, &c. and his assigns, occupiers of the said last-mentioned piece or parcel

1822.

KOOYSTRA
against
Lucas.

6th of July, 1820, (when the old leases would expire,) for 35 years. By the plan in the margin of the lease, the spot of ground upon which the plaintiff had built his coach-house and stables, was described as part of the premises demised under the name of "a cow-shed part of Sprang's Dairy." On the 29th of April, 1814, Mr. *Pisston*, by the appointment of the Duke of *Portland*, granted to Messrs. *Hayward*, then of No. 73, Oxford-Street, a reversionary lease of the rest of the dairy, to commence on the 6th April, 1820, and there was no mention of any right of way having been reserved to the plaintiff. On the 18th March, 1820, *Hayward* granted *Sprang* (who had occupied the dairy for some years) a lease of that part of the dairy demised to them for the whole of their term, wanting five days, and reserved a right of way to the occupiers of No. 71 and 72, down the gateway. *Sprang* afterwards assigned his interest to the defendants. It appeared, that, at the time of the granting the lease in 1814, and for many years before, the yard in question had been in the possession of one person, who, of course, had used the gateway as a way for his horses and cattle to every part of the yard. The obstruction of the way was proved as laid in the declaration. The Lord Chief Justice was of opinion, that the plaintiff was entitled to the right of way claimed for himself and cattle to the spot of ground on which he had built his stable and coach-house, that being a part of the demised premises to which such a way had been used previously to 1814.

1822.

 KERSEY
against
LUCAS.

Gurney now moved for a new trial, and contended, that the plaintiff had acquired no such right of way by the terms of the lease in 1814. If the lessor had intended to grant such a right of way as that claimed, it

that a right of way, which at the time of the granting of the lease, was used with any part of the demised premises passed to the plaintiff. This was a way always used with a part of the premises demised, and therefore passed to the plaintiff.

1822.

Kooystra
against
Lucas.

Rule refused. (a)

(a) If a man, seised of *Blackacre* and *Whiteacre*, uses a way through *Whiteacre* to *Blackacre*, afterwards grants *Blackacre* with all ways, this way through *Whiteacre* shall pass to the grantee, *Chayns' Dig.* tit. *Chemin*, D 3. So, if he be seised of two acres to which a way is appurtenant, he grants one acre with all ways, &c., the way shall be granted. See 6 *Modern.* p. 3. *Cro. Jac.* 121, 122. 170.

Lord SONDES against FLETCHER.

Tuesday,
June 11th.

DEBT on a bond, the condition of which was, for the resignation of the rectory of *Kettering*, (to which the defendant had been presented by the plaintiff,) when either of two persons therein named should be capable of taking the same. Breach, that the defendant although requested, refused to resign. At the trial before *Abbott C.J.*, at the *Middlesex* sittings after *Easter term*, it appeared that the defendant was called upon to resign the living, in *October 1820*, and that he refused so to do. The net annual value of the living was 700*l.*, and it was proved at the trial, that the defendant's life-interest, he being 46 years of age, was worth 10 years' purchase. It also appeared, that the life-interest of one of the persons named in the bond, whom the plaintiff intended to present, was worth 14 years' purchase. The jury found a verdict for the latter amount. The Solicitor-General moved for a new trial, on two grounds; 1st, That the true measure of the damages is the amount by which

A bond was conditioned for the resignation of a living, which the defendant when requested had refused to resign: Held, that he being a wrong doer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest, nor in estimating the annual proceeds to deduct the curate's stipend.

1822.

JONES *against* BIRD and Others.Wednesday,
June 13th.

CASE by the plaintiff, as the owner of the reversion, against the defendants who were employed under the commissioners of sewers for damage done to a house in the parish of *St. Clement, Danes*, in the county of *Middlesex*. The first count of the declaration averred, that the defendants made, altered, repaired, cut, dug, worked and enlarged, certain sewers, gutters and ditches, being and running near unto the said house in which plaintiff was interested, and also near to five other messuages, &c. near to the plaintiff's house, but nearer to the said sewers, &c. (and which five messuages were built close to each other, and one of them adjoining to the plaintiff's house) in so negligent, incautious, unskilful, improvident, and improper a manner, that by means thereof, the said five messuages were thereby undermined, and the walls gave way and fell down, and by means thereof, the walls of the plaintiff's house were damaged and fell down, &c. The second count stated, that the defendants wrongfully and unlawfully altered

By a local act relating to the commissioners of sewers for Westminster, it was provided that no plaintiff should recover in any action brought for any thing done in pursuance of the general acts for sewers, or that act, unless notice in writing was given to the defendants specifying the cause of such action. A notice stated that the defendants, who were contractors under the commissioners, made, altered, &c. certain sewers, &c. running under, through, or adjoining, or near to the plaintiff's house, in so negligent, in-

cautious, unskilful, improvident, and improper a manner, that it fell down; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five other houses adjoining thereto, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the continuance of the work: Held, that this notice sufficiently described the cause of action: Held also, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up if necessary, as skilful persons would do, and that they were bound, under the above circumstances, to give specific notice to the owner of the house to which the stack of chimneys belonged, of their construction, and of the danger arising therefrom, and that a general notice to him to take proper means to secure his house was not sufficient.

dig, work, and enlarge certain sewers, gutters, ditches, and works then being, and running, under, through or adjoining, or near unto a certain messuage or tenement, shop and premises of the plaintiff, situate and being, &c. in the tenure or occupation of *E. H.* his tenant, in so negligent, incautious, unskilful, improvident, and improper a manner, that the said messuage or tenement, shop and premises, or the greater part thereof, fell and were greatly damaged, weakened and destroyed, and rendered unfit and dangerous for use or habitation." It further appeared by the evidence, that the sewer, which it was necessary to repair, passed close to five houses adjoining that belonging to the plaintiff, and that a stack of chimneys belonging to one of those houses was built upon the arch of the sewer. In the execution of the work it became necessary to rebuild this arch, and in order to support the chimneys in the meantime, a transum and two upright posts were placed under them in order to support them, but without success. The chimneys fell, and in consequence of their fall, the adjoining houses, including the plaintiff's house, fell also. There was contradictory evidence as to the facts, whether in case there had been raking shores placed externally to support the chimneys in addition to the support below them, the accident would have been prevented. The plaintiff's witnesses were of opinion that it would, and those for the defendants, that it would not have been of any use, and that it was impossible to have prevented the fall of the chimneys. There was no specific notice given to the owner of the house to which the chimneys belonged, of their dangerous state, or that it would be necessary for him to take them down. But there was a general notice to the inhabitants to secure

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is required by the act is, that notice in writing shall be given to the defendants twenty-eight days before the action is commenced of such intended action, signed by the attorney for the plaintiff, specifying the cause of such action: and the section further provides, that the plaintiff shall not recover, if sufficient amends shall have been tendered. The object, therefore, was not to give an accurate and minute description of the cause of action, as required in a declaration, but only a substantial notice of the ground of complaint to enable a party to tender amends. Here it states, that defendants worked the sewer in so negligent, incautious, unskilful, and improvident a manner, that the plaintiff's messuage, or the greater part thereof, fell, and was greatly weakened, damaged, and destroyed. The sewer was the primary support of the plaintiff's house, and the adjoining ones also: and the fall is in fact the immediate consequence of the defendants' negligence. There is no other intervening cause of the accident. The whole fell together in consequence of the defendants' act. That act is, therefore, the immediate cause of the accident to each of the houses. As to the other point: this was a case for the jury, and the weight of evidence is in favour of the verdict. Here it was clearly the duty of the commissioners to have shored up the houses whilst the work was going on. And the evidence is strong to shew, that if that had been done, no accident would have happened. It is now said that it would have been useless. But originally the question was not, whether it was useless, but, whether the commissioners were liable to do it. There is good reason why they should be liable; for they may go into the adjoining houses, if necessary, for the purpose. But private individuals

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claration drawn so as to contain only one count, stating what is here stated in the notice. It is clear that then the plaintiff would have been nonsuited, on the ground of a variance. Here, therefore, there is a variance between the notice and the proof. If the notice had stated that the injury occurred from want of shoring up the houses, the defendants might have tendered amends. As to the other question, it may be admitted, that as to the necessity for shoring up the houses there is contradictory evidence. But the proper question is, whether the defendants acted for the best, and bona fide with their best skill. If they did, and there is no contradiction as to that, they are not responsible. It is too much to make them liable because, after the accident has happened, some persons may be found to give their opinion that a different course might possibly have prevented the accident. The whole arose from the improper construction of the stack of chimneys, which rested on the arch of the sewer. And, if nothing had been done by the defendants, the houses would have equally fallen in a short time, from the decay of the sewer. The owner of the house must have known of the construction of the chimneys, and the defendants were not bound to give a specific notice of it. They had given a general notice to all the inhabitants to secure their houses while the sewer was repairing, and that was sufficient. Here the defendants were acting bona fide in the exercise of a public duty, imposed by law; and *Sutton v. Clarke* (a) is an authority to shew, that in such a case an action is not maintainable against them.

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BAYLEY J. I am of the same opinion; I think the notice was sufficient, and that the case was properly left to the jury, who have come to a right conclusion. A notice of this sort does not require the same precision as a declaration. It is quite sufficient if it calls the attention of the defendants to the general nature of the injury, so that they may go to the premises, and see what the ground of complaint is. If it were otherwise, it would be necessary, in many cases, to have a notice with several counts in it. Here the notice, in substance, states, that the defendants so negligently and improperly worked the sewer, that the plaintiff's house was thereby weakened and gave way. Now the facts are, that the defendants worked under a stack of chimneys, without either properly securing them, or giving notice of their danger to the owner, in order that he might take them down; this was improperly and negligently working the sewer; for if a party does an act which is improper, unless certain previous precautions are taken, he may fairly be said to do that act improperly. But it is said, further, that the notice is incorrect, inasmuch as the act done by the defendant did not produce an immediate effect upon the plaintiff's house. But I think, that as the defendant did work without sufficiently supporting the chimneys, which by their fall, damaged the plaintiff's house, he may fairly be said to have, by his act, damaged the plaintiff's house. The notice, therefore, is sufficient. As to the merits of the case, it is contended, that the defendants are protected, if they acted *bonâ fide* and to the best of their skill and judgment. But that is not enough; they are bound to conduct themselves in a skilful manner; and the question was most properly left to the

jury

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1822.

WILTON *against* GIRDLESTONE.Wednesday,
June 12th.

TROVER for certain deeds. I'lea, general issue. At the trial, at the *Middlesex* sittings after *Easter* term before *Abbott* C. J., it appeared that the bill which was against defendant as an attorney was entitled generally as of *Michaelmas* term, but the memorandum shewed that the bill was filed on the 28th of *November*. It was proved, however, that the bill was actually filed on the 24th of *December*. This evidence was objected to, on the ground that it contradicted the record; but the Lord Chief Justice overruled the objection. The deeds in question were proved to have been placed in the defendant's hands before *Michaelmas* term. But the only evidence of a conversion was a demand and refusal on the 29th of *November* last. The jury having found a verdict for the plaintiff,

Abraham, by leave, moved to enter a nonsuit, on the ground that the evidence ought not to have been received as it contradicted the record.

Per curiam. *Morris v. Pugh* (a) is an authority to shew that this objection cannot be sustained. A demand and refusal is evidence of a prior conversion; and as the deeds were in the defendant's hands prior to *Michaelmas* term, there was evidence for the jury of a conversion before that period, and they have found the fact to be so.

Rule refused.

(a) 3 *Burr.* 1241.

A bill against an attorney was filed of *Michaelmas* term, and appeared by the memorandum to have been filed on the 28th *November*: Held, that evidence was admissible to shew that it was actually filed on the 24th *December*: Held also, that a demand and refusal is evidence of a prior conversion, and therefore where deeds were in defendant's possession prior to *Michaelmas* term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term.

costs depend on the event of it : and how are they to be taxed ?

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JACKSON
against
YASLEY.

Per Curiam. We are of opinion that the award is final. It is sufficient, if looking at the whole award, it appears that the matter is determined ; and that is the case here.

Rule discharged.

**GOODTITLE, on the Demise of the Duke of
NORFOLK, against NOTITLE.**

*Wednesday,
June 12th.*

READER applied for leave to enter up judgment against the casual ejector. The notice to the tenant in possession at the foot of the declaration in ejection, was in the name of, and signed by the lessor of the plaintiff. He referred to the 1 G. 4. c. 87. s. 1. by which the landlord, in order to bring the case within that act, is required to address the notice at the foot of the declaration to the tenant in possession.

The notice to the tenant in possession at the foot of the declaration in ejection, need not be in the name of the plaintiff; but, if in the name of the lessor of the plaintiff, or even any other person, the Court will permit the rule for judgment against the casual ejector to be drawn up.

The Court held, that the notice was quite regular; adding, that even if it were signed by a wrong name, the rule might be drawn up.

Rule absolute.

Martin v. Cromp (*a*), it is laid down, that if there be two tenants in common of a reversion, expectant on a lease for years, upon which a rent is reserved, they may either join in debt, for the rent, or sever; and *Midgley v. Lovelace* (*b*) is an authority to shew that they may also join in covenant; and in *Littleton*, s. 315., it is laid down, that tenants in common may maintain personal actions jointly; and in s. 316., that if two tenants in common make a lease, rendering to them a rent, the tenants in common shall have an action against the lessee, and not different actions, because the action is in the personality. The action for use and occupation is substituted in place of the action of debt, and, consequently, the plaintiffs were entitled to bring a joint action, unless the jury found, as a fact, that there was a separate demise by each. He also cited *Co. Litt.* 218. and *Harrison v. Barnsby*. (*c*)

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 Powis
against
Smith

ABBOTT C. J. It is clear, that if there be a joint lease by two tenants in common, reserving an entire rent, the two may join in an action brought to recover the same; but if there be a separate reservation to each, then there must be separate actions. Here, by the original contract, there was a letting of the whole premises, by the two tenants in common, at an entire rent; afterwards the rent was severed. It became a question of fact, upon the whole evidence, whether the parties thereby meant to enter into a new contract, with a separate reservation of rent to each, or whether they meant to continue the old reservation of rent, each of the plaintiffs receiving his own moiety. I think that question ought to have been left to the jury. The rule, therefore, for a new trial ought to be made absolute.

(*a*) 1 *Ld. Raym.* 340.(*b*) *Cartew*, 289.(*c*) 5 *Term Rep.* 246.

issue thereon for the whole. Judgment was signed on this warrant of attorney, *April* 5th, 1816. At the time when the commission issued, there remained due on the warrant of attorney 1337*l.* 15*s.*; and shortly after, another instalment becoming due, default was made. On the 14th of *March*, 1818, *Bodfield* proved the debt under the commission; and on the 25th of *March*, 1818, the plaintiff and *Bodfield* agreed that the former should pay 500*l.* *in discharge of his personal liability as surety*, which was done, and satisfaction was entered on the record as of *Michaelmas* term, 1818. The roll of the judgment was, however, only carried in and satisfaction entered on the record subsequently to the sittings after last *Michaelmas* term, and shortly before the adjourned sittings, when the cause was tried. At the trial, after the office copy of the judgment roll had been given in evidence, a plea of the defendant's certificate *puis darrein continuance* was offered by the Solicitor-General. The Lord Chief Justice was of opinion, that as the whole of *Michaelmas* term had elapsed, during which the defendant might have pleaded it in bank, he was now too late, and refused to receive the plea. The plaintiff accordingly had a verdict. The Solicitor-General, in last *Hilary* term, obtained a rule nisi for a new trial, with liberty for the defendant to plead his certificate *puis darrein continuance nunc pro tunc* as of *Michaelmas* term.

Marryat and *Espinasse* shewed cause. Here the defendant was too late; for he obtained the certificate in the vacation after *Trinity* term; and therefore he might, at any time during the whole of *Michaelmas* term, have put in this plea. Besides, the plea, if put in, cannot

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against
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tended, under such circumstances, to take away the right of action which he previously possessed.

Rule discharged.

1822.

*SOUTER
against
SOUTER.*

CARTER and Another *against Toussaint.*

*Friday,
June 14th.*

A SSUMPSIT for the price of a horse, with the usual money counts. Plea, general issue. At the trial, at the *Middlesex* sittings after last *Hilary* term, before *Abbott C. J.*, it appeared that the plaintiffs, who were farriers, sold to the defendant a race horse, by a verbal contract, for 80*l.* The horse, at the time of the sale, required to be fired, which was done with the approbation of the defendant and in his presence; and it was agreed that the horse should be kept by the plaintiffs for twenty days, without any charge being made for it. At the expiration of the twenty days the horse was, by the defendant's directions, taken by a servant of the plaintiffs' to *Kimpton Park*, for the purpose of being turned out to grass there. It was there entered in the name of one of the plaintiffs, which was also done by the directions of the defendant, who was anxious that it might not be known that he kept a race-horse. No time was specified in the bargain for the payment of the price. The defendant afterwards refused to take the horse. The jury, under the direction of the Lord Chief Justice, found a verdict for the plaintiffs. *Scarlett*, in last *Easter* term, obtained a rule nisi for entering a nonsuit, on the ground reserved at the trial, that there was not a sufficient acceptance by the defendant to take the case out of the 17th section of the statute of frauds.

A horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendors for 20 days without any charge to the vendee. At the expiration of that time the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors: Held, that there was no acceptance of the horse by the vendee within 29 Car. 2. c. 4. s. 17.

Scarlett and Lawes, contra. If this question were now for the first time to be determined, no doubt could be entertained by any one who looked at the words of the statute. It is not requisite indeed, that to constitute an acceptance, the goods should be in the manual possession of the vendee. But he must at least have the complete controul before he can be considered as having accepted them. If the key of the warehouse where they are deposited is delivered to him, or an order for delivery to him is signed in the wharfinger's books, in these and the like instances it may fairly amount, if he assents, to an acceptance on his part. For there, he on the one hand has the complete controul without any lien on the part of the vendors; and on the other hand, he cannot after that be allowed to object to their quality, &c. But if that criterion be applied to this case, it will determine it in favour of the defendant. For here, he had no controul over the horse. He could not have compelled the park keeper to have delivered it to him. Here too, there was no time fixed for the payment of the price, and therefore, the vendors would not have been bound to part with the horse till the price was paid. This, therefore, falls within the cases of *Hanson v. Armitage* (a), and *Tempest v. Fitzgerald* (b). *Elmore v. Stone* is a case of doubtful authority, but at all events, it is not precisely in point with this. There, the Court considered the vendor as having by his own act become the agent of the vendee, and having thereby lost his lien for the price of the horse. But here the party has not lost that lien. Suppose *Carter* had become bankrupt, it is clear that the horse would have gone to his as-

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 against
 TOUSSAINT.
(a) *Ante*, 557.

(b) 3 B. & A. 680.

signees,

tiffs' name, and the plaintiffs' character of owner remained unchanged from first to last, and they could not have been compelled to deliver it without the payment of the money. There was then no sufficient acceptance to take the case out of the statute of frauds; and consequently the action is not maintainable.

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against
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BAYLEY J. The statute of frauds is a remedial law, and we ought not to endeavour to strain the words in order to take a particular case out of the statute. By the 17th section it is provided, that in the case of a sale of goods above the value of 10*l.*, the buyer must accept, and actually receive part of the goods so sold. There can be no acceptance or actual receipt by the buyer, unless there be a change of possession, and unless the seller divests himself of the possession of the goods, though but for a moment, the property remains in him. Here, the plaintiffs had a lien on the horse, and were not compellable to part with the possession till the price was paid. Then the question is, was there any thing to deprive them of that right? It is said that the horse was fired, but after that he still remained in their possession; then he was sent under the care of their servant to *Kimpton Park*. But that was no act of delivery to dispossess them of the horse. At *Kimpton park*, he was entered in the name of one of the plaintiffs, and they still therefore retained a controul over him. How can it be said that the horse was in the possession of the defendant, when he had no right to compel a delivery to him. For he could not, on tendering the keep, maintain trover against the park keeper, because the possession had not passed from the vendors to him. The case of *Elmore v. Stone* is distinguishable.

There

1822.

EASUM and Others, Assignees of DOWSLAND
and Another, Bankrupts, *against CATO.*

Tuesday,
June 18th

ASSUMPSIT for money had and received, and the usual money counts. Plea, general issue. At the trial, at the *Guildhall* sittings after last *Hilary* term, before *Abbott C. J.*, a verdict, under the directions of the Lord Chief Justice, was found for the defendant. The following were the facts of the case: *Dowland* and *Davison*, the bankrupts, were ship and insurance brokers in *London*, and the defendant, *Cato*, was a clerk in a bank at *Lichfield*. In *December*, 1818, the bankrupts, who were then indebted to the defendant in a large amount, were desirous to make shipments of goods on their own account and risk, to *Rio de Janeiro*. They accordingly purchased goods to the amount of 8000*l.*, in their own names, but with a view of shipping the same through the house of Messrs. *I. and W. March*, in the name of the defendant. It appeared, from a letter dated 17th *December*, 1818, from the bankrupts to the defendant, and his answer thereto, that the shipment was on the account and risk, solely, of the bankrupts, and that the defendant had no interest in it. The bankrupts, however, represented to Messrs. *I. and W. March*, that the goods belonged to, and were shipped on the account of the defendant. The goods were accordingly shipped, and the defendant, by the desire of

Where *J. S.* being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants, through whom the shipment was to be made, that the goods were the property of *A.*, and shipped on his account, and *A.* accordingly, by the desire of *J. S.*, wrote to those merchants, stating the party to be so, and directing them to insure, and to advance money to *J. S.* on the goods, which was done: Held, that this was a credit given to *A.* by *J. S.* by the delivery of goods in their nature likely to terminate in a debt, and that, therefore, *J. S.* having subsequently become bankrupt, *A.* was entitled to recover the proceeds of the shipment from the merchants, and to set off against them a debt due from the bankrupt to him, it being a case of mutual credit within 5 G. 2. c. 30. s. 28.

the

siderable advances in cash and bills to *Dowsland* and *Davison*, making a balance due to the defendant, of 1196*l.* 10*s.* 1*d.* on the 14th *June*. *Dowsland* and *Davison* became insolvent in *July*, 1819, and committed acts of bankruptcy about the 19th *March*, 1820, and a commission issued against them, dated the 19th *May*, 1820, under which the plaintiffs were chosen assignees. After their insolvency, the house of *March*, brothers, and Co., of *Rio Janeiro*, forwarded to the house of *I. and W. March* and Co., *London*, the accounts sales of the copper consigned to them, with three letters addressed to the defendant, dated 27th *September*, 1819, and 19th *April*, and 6th *May*, 1820. This was the only correspondence which the defendant had with them, but it is not usual for persons making consignments through *London* houses, to correspond with the houses abroad, who know only the house through which the consignments are made. On the 29th *July*, 1820, the assignees, through their solicitors, wrote letters to Messrs. *I. and W. March* and Co., claiming the property in question, and requiring them not to account to any persons but themselves for the same. After the issuing of the commission of bankruptcy the returns for the shipment so made to the house of *March*, brothers, amounting to 247*l.* 19*s.* 11*d.*, came home to the house of *I. and W. March* and Co., who, in *December*, 1820, paid to the defendant the sum of 10*l.* in part of such proceeds. This payment was made to the defendant before this action was brought, and after notice given of the bankruptcy, and of the claim made by the assignees. At the time of the bankruptcy *Dowsland* and *Davison* were indebted to the defendant in the sum of 3102*l.* 18*s.* 8*d.* for monies paid and advanced by the defendant, and for liabilities

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against
CATO.

bankruptcy, could have set them off against the debt due from them to him. And what is the difference? Here it was a credit, given by the delivery of the goods, in its nature likely to terminate in a debt; and that is the criterion laid down by *Gibbs C. J.* in *Rose v. Hart.* (a) This case falls, therefore, within the principle laid down in *Olive v. Smith* (b), and *French v. Fenn.* (c)

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against
Cato.

Marryat, Puller, and Maule, contra, contended, that this was not within the statute. Here the bankrupts could have compelled the house of *March* and Co. to account for the proceeds to them. For the defendant was not at all interested in the gain or loss arising from the transaction. There is no instance to be cited in which it has been determined to be a case of mutual credit, unless where the goods have been delivered to and are in the possession of the party himself. That was the case in *Olive v. Smith* and *French v. Fenn*, which are, therefore, distinguishable from the present case. In *Sampson v. Burton* (d), where they were in the hands of a third person, it was held not to be within the statute. As to the finding by the jury, there is clearly no evidence to support it.

ABBOTT C. J. My opinion, in this case, is not founded upon the intention found by the jury, but on the ground that the facts here establish a case of mutual credit. It appears that the bankrupts, being desirous of making consignments to *Rio de Janeiro*, and not choosing

(a) 2 *Bay. M.* 547. (b) 5 *Tenn.* 56. (c) *Cooke's B. L.* 7th ed. 536.
(d) 2 *Brod. & B.* 89. 4 *B. Moore*, 515.

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seems to me, to amount to a consent by the bankrupts, that the defendant shall be considered by *I. and W. March* as the owner of the goods consigned. And one consequence resulting from that would be, that the defendant would have the right to require from *I. and W. March*, an account of the proceeds and the payment of the balance due. It amounts, therefore, to a consent by the bankrupts, that the money produced by the consignments should pass through the defendant's hands. In that case, he would have a right to deduct from it the debt due to him. And that might be the ground for his permitting the bankrupts to be, and to remain in his debt. It is said in argument, that the bankrupts could have compelled *I. and W. March* to account for the proceeds with them. But that is a *petitio principii*. For they could not do so, if the defendant had a right to receive and to stop the money in transitu; for such a right would be a beneficial interest in him, and the bankrupts could not, therefore, countermand his authority to receive the money. I think, therefore, that this was a case of mutual credit, likely to terminate ultimately in a pecuniary balance on the one side or the other. It is, therefore, within 5 G. 2. c. 20. s. 28., and the defendant is entitled to our judgment.

HOLROYD J. I am of opinion that this is a case of mutual credit, and therefore, that independently of the intent found by the jury, the verdict is right. The case lies within a narrow compass. The defendant does not lend his name generally to the bankrupts, but only for a particular transaction. The goods were to be sent in the defendant's name by *I. and W. March* to *Rio de Janeiro*, and the proceeds were to be remitted to them as his

longing to a debtor of his, which could not be got from him without an action at law or a bill in equity. Now that is the case here; for these goods could not have been given up to the bankrupts against the consent of the defendant, except by some proceedings of that nature. This, therefore, is a case of mutual credit, and the defendant is entitled to our judgment.

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EASTON
against
CATO,

Rule discharged.

WELLS *against* GREENHILL.

DECLARATION against the defendant, as the maker of several promissory notes, bearing date in *Semptember*, 1818, and *May*, 1819. Plea, non-assumpsit. At the trial, before Abbott C. J., at the *Middlesex* sittings after last *Michaelmas* term, the only question was, whether the defendant was discharged from the plaintiff's claim by the provisions of a composition-deed. It appeared that, by lease and release, of the 12th and 13th *October*, 1819, made between the defendant of the one part, and certain trustees named therein of the other part, the defendant conveyed all

mortgages, and all his personal estate whatsoever, upon trust to carry on the brewing and malting business for the benefit of the creditors, and to collect outstanding debts, and to sell the farming stock, and out of the monies arising from the sale of any part of the estate that should be mortgaged, to satisfy the mortgage, and to stand possessed of the residue upon trust to pay *J. P.* the rent due to him, the dues due to the crown, the rent which was, or thereafter should become due for any of the premises assigned, the interest upon the mortgages, then the judgment debt due to *A. and B.*, then to pay all the creditors whose debts did not amount to 10*l.* in full, and at the expiration of nine months to pay all the other creditors the amount of 5*s.* in the pound. There was a covenant by the creditors that they would release their respective claims to the insolvent. The indenture contained a proviso, that in case any creditor whose debt should amount to 100*l.*, or any two creditors whose debts should amount to 150*l.* should not execute within three calendar months, the deed should be void. *A. and B.*, the judgment creditors, whose debt exceeded 150*l.*, did not execute the deed within the time required: Held, that the deed was not thereby rendered void, the intention manifestly being that those creditors only who were to require a composition under the deed, were to execute it.

benefit of the creditors, to collect outstanding debts, and to sell the farming stock and all other effects of the defendant, and out of the monies arising from the sale of any part thereof as should be mortgaged, to pay and satisfy the mortgagees, and to stand possessed of the residue of the monies, upon trust to pay the costs of the trust-deeds, then to pay *Poynitz* the rent due to him, the duties due to the crown, the rent which then was or thereafter should become due for any of the premises assigned, the interest which then was or thereafter should become due upon the mortgages, then to pay the debt due to *Stoveld* and *Upperton* upon their bond and judgment, with interest; then to pay in full all the creditors whose debts did not amount to 10*l.*; then, at the expiration of nine months, to pay all the other creditors named in the schedule the amount of 5*s.* in the pound on their respective debts, without preference or priority; and after the expiration of eighteen months, the period of management of the brewing and malting business, or as soon as conveniently might be, to convert all the remaining trust-estate, and get in all the remaining debts, to pay all debts and expences of the trust, and all incumbrances, and to stand possessed of the residue upon trust, to apply the same towards the full discharge of so much of the debts of the creditors named in the schedule as should be then remaining unpaid, rateably and without any preference; and, lastly, to pay the surplus (if any) of the trust estate to the defendant. There then followed a covenant, by the creditors who executed the deed, that if the indenture did not become void by virtue of the proviso therein contained, the respective creditors would, at any time after the determination of the eighteen months, release to the

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WELLS
against
GREENHILL.

such of the creditors as did not amount to 10%, but in consequence of a deficiency of the assets, they had not been able to pay the other creditors any dividend on account of their debt. It was contended at the trial on the part of the plaintiff, that the deed was void because *Stoveld* and *Upperton* had not executed it. The Lord Chief Justice, however, was of opinion, that that was not necessary, and the plaintiff was nonsuited, but leave was reserved to move to enter a verdict for the plaintiff, if the Court should be of opinion that the deed was void in consequence of its not having been executed by *Stoveld* and *Upperton*. A rule nisi having been obtained accordingly.

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WELLS
against
GREENHILL.

Marryat and *Courthope* now shewed cause. The proviso does not extend to those creditors, whose debts by the terms of the deed were to be paid in full. If it did, it would follow that the deed should have been executed by somebody on the part of the crown and by the mortgagees. The object of the deed was, to enable the trustees to raise funds by carrying on the trade for 18 months, and thereby to pay the debts in whole or in part of those creditors, who, at the time of executing the deed had no means of compelling instant payment. The debt of the crown at that time might have been levied by an extent, the rent might have been levied by distress, and the debt of the judgment creditor by instant execution. By the provisions of the deed, therefore, those creditors were to be paid in the first instance, and they might have been paid within three months after the date of the deed, and if *Stoveld* and *Upperton* had been paid their debt within three months, it certainly could not have been necessary for them to become parties

to

are certainly large enough to comprise all those to whom the defendant owed money, but we are to look at the whole deed to learn whether those words are used in a general or limited sense. If they are used in the former sense, they would clearly include a mortgagee. But it is conceded in argument that they do not apply to him. Then if so, they are clearly used in a limited sense, and the question is how far they are limited. Now, that can only be ascertained by looking at the whole deed, which is made between the defendant of the first part, certain trustees of the second part, and certain creditors therein named of the third part, and it recites that the defendant was indebted to *Poyntz* 15*l.* for rent, to the crown for 41*l.* for duties, to *Stoveld* and *Upperton* 40*l.* upon bond and judgment, and to the creditors named of the third part, in the sums of money set opposite their names in the schedule. Now, it is observable that *Stoveld* and *Upperton* are here mentioned and distinguished from the creditors of the third part. The deed then conveys the property of the defendant to trustees upon trust, to pay the rent due to *Poyntz*, the duties due to the crown, and the judgment-debt to *Stoveld* and *Upperton*, and then to pay all the creditors whose debts are under 10*l.* in full, and after that 5*s.* in the pound to all other the creditors mentioned in the schedule. The deed also contains a covenant, that the creditors who executed the indenture would release their claims on the defendant. Now, if *Stoveld* and *Upperton* had executed the deed, they would have been parties to this latter covenant, and the effect of that would be, to make them covenant to release that debt, which by the provisions of the deed had been previously agreed to be paid in full. But this would be an inconsistent provision.

1822.
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WELLS
against
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by deed appoint, and in default of appointment, to the use of the said *Edward Bliss* and his assigns during his life; and after the determination of that estate in his life time, to the use of *William Bliss* and his heirs, during the life of *Edward Bliss*, in trust for *Edward Bliss* and his assigns, with remainder to the use of *Edward Bliss*, his heirs and assigns for ever. By a lease of the 29th *September*, 1810, made between *Edward Bliss* of the one part, and *James Remmonds* of the other part, for the considerations therein expressed, the said *Edward Bliss* did demise unto the said *James Remmonds* the said messuage or tenement called the *White Bear*, public house, and the said messuage or tenement adjoining thereto with their appurtenances, to hold to him from thenceforth for 21 years, at the yearly rent of 65*l.* 10*s.* *Edward Bliss*, on the 15th of *March*, 1814, duly contracted to sell the said messuage or tenement called the *White Bear* with the appurtenances, to the defendant, *Collins*, and by the printed particulars of sale it was declared that that house, with a house adjoining, was on lease to *Remmonds*, and that the apportioned rent in respect of the public house, was 40*l.* per annum. The defendant, *Collins*, having refused to complete his purchase, *Edward Bliss* filed his bill in the Court of Chancery against the defendant, for a specific performance of this contract. By lease and release, dated respectively the 23d and 24th of *March*, 1819, the release being between *Edward Bliss* of the first part, *William Bliss* of the second part, and *Samuel Harris* of the third part; after reciting the lease and release of the 28th and 29th *March*, 1808, and the lease of the 29th of *September*, 1810, and the sale of the public house called the *White Bear*, to defendant, *Collins*; and that,

1822.

BLISS
against
COLLINS.

benefit of the creditors, to collect outstanding debts, and to sell the farming stock and all other effects of the defendant, and out of the monies arising from the sale of any part thereof as should be mortgaged, to pay and satisfy the mortgagees, and to stand possessed of the residue of the monies, upon trust to pay the costs of the trust-deeds, then to pay *Poyntz* the rent due to him, the duties due to the crown, the rent which then was or thereafter should become due for any of the premises assigned, the interest which then was or thereafter should become due upon the mortgages, then to pay the debt due to *Stoveld* and *Upperton* upon their bond and judgment, with interest; then to pay in full all the creditors whose debts did not amount to 10*l.*; then, at the expiration of nine months, to pay all the other creditors named in the schedule the amount of 5*s.* in the pound on their respective debts, without preference or priority; and after the expiration of eighteen months, the period of management of the brewing and malting business, or as soon as conveniently might be, to convert all the remaining trust-estate, and get in all the remaining debts, to pay all debts and expences of the trust, and all incumbrances, and to stand possessed of the residue upon trust, to apply the same towards the full discharge of so much of the debts of the creditors named in the schedule as should be then remaining unpaid, rateably and without any preference; and, lastly, to pay the surplus (if any) of the trust estate to the defendant. There then followed a covenant, by the creditors who executed the deed, that if the indenture did not become void by virtue of the proviso therein contained, the respective creditors would, at any time after the determination of the eighteen months, release to the

1822.

WILLS
against
GREENHILL.

such of the creditors as did not amount to 10*l.*, but in consequence of a deficiency of the assets, they had not been able to pay the other creditors any dividend on account of their debt. It was contended at the trial on the part of the plaintiff, that the deed was void because *Stoveld* and *Upperton* had not executed it. The Lord Chief Justice, however, was of opinion, that that was not necessary, and the plaintiff was nonsuited, but leave was reserved to move to enter a verdict for the plaintiff, if the Court should be of opinion that the deed was void in consequence of its not having been executed by *Stoveld* and *Upperton*. A rule nisi having been obtained accordingly.

1822.

WILLS
against
GAKENMILL.

Marryat and *Courthope* now shewed cause. The proviso does not extend to those creditors, whose debts by the terms of the deed were to be paid in full. If it did, it would follow that the deed should have been executed by somebody on the part of the crown and by the mortgagees. The object of the deed was, to enable the trustees to raise funds by carrying on the trade for 18 months, and thereby to pay the debts in whole or in part of those creditors, who, at the time of executing the deed had no means of compelling instant payment. The debt of the crown at that time might have been levied by an extent, the rent might have been levied by distress, and the debt of the judgment creditor by instant execution. By the provisions of the deed, therefore, those creditors were to be paid in the first instance, and they might have been paid within three months after the date of the deed, and if *Stoveld* and *Upperton* had been paid their debt within three months, it certainly could not have been necessary for them to become parties

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are certainly large enough to comprise all those to whom the defendant owed money, but we are to look at the whole deed to learn whether those words are used in a general or limited sense. If they are used in the former sense, they would clearly include a mortgagee. But it is conceded in argument that they do not apply to him. Then if so, they are clearly used in a limited sense, and the question is how far they are limited. Now, that can only be ascertained by looking at the whole deed, which is made between the defendant of the first part, certain trustees of the second part, and certain creditors therein named of the third part, and it recites that the defendant was indebted to *Poyntz* 15*l.* for rent, to the crown for 41*l.* for duties, to *Stoveld* and *Upperton* 40*l.* upon bond and judgment, and to the creditors named of the third part, in the sums of money set opposite their names in the schedule. Now, it is observable that *Stoveld* and *Upperton* are here mentioned and distinguished from the creditors of the third part. The deed then conveys the property of the defendant to trustees upon trust, to pay the rent due to *Poyntz*, the duties due to the crown, and the judgment-debt to *Stoveld* and *Upperton*, and then to pay all the creditors whose debts are under 10*l.* in full, and after that 5*s.* in the pound to all other the creditors mentioned in the schedule. The deed also contains a covenant, that the creditors who executed the indenture would release their claims on the defendant. Now, if *Stoveld* and *Upperton* had executed the deed, they would have been parties to this latter covenant, and the effect of that would be, to make them covenant to release that debt, which by the provisions of the deed had been previously agreed to be paid in full. But this would be an inconsistent provision,

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WILLIS
signature
GREENHILL

by deed appoint, and in default of appointment, to the use of the said *Edward Bliss* and his assigns during his life; and after the determination of that estate in his life time, to the use of *William Bliss* and his heirs, during the life of *Edward Bliss*, in trust for *Edward Bliss* and his assigns, with remainder to the use of *Edward Bliss*, his heirs and assigns for ever. By a lease of the 29th *September*, 1810, made between *Edward Bliss* of the one part, and *James Remmonds* of the other part, for the considerations therein expressed, the said *Edward Bliss* did demise unto the said *James Remmonds* the said messuage or tenement called the *White Bear*, public house, and the said messuage or tenement adjoining thereto with their appurtenances, to hold to him from thenceforth for 21 years, at the yearly rent of 65*l.* 10*s.* *Edward Bliss*, on the 15th of *March*, 1814, duly contracted to sell the said messuage or tenement called the *White Bear* with the appurtenances, to the defendant, *Collins*, and by the printed particulars of sale it was declared that that house, with a house adjoining, was on lease to *Remmonds*, and that the apportioned rent in respect of the public house, was 40*l.* per annum. The defendant, *Collins*, having refused to complete his purchase, *Edward Bliss* filed his bill in the Court of Chancery against the defendant, for a specific performance of this contract. By lease and release, dated respectively the 23d and 24th of *March*, 1819, the release being between *Edward Bliss* of the first part, *William Bliss* of the second part, and *Samuel Harris* of the third part; after reciting the lease and release of the 28th and 29th *March*, 1808, and the lease of the 29th of *September*, 1810, and the sale of the public house called the *White Bear*, to defendant, *Collins*, and that,

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against
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against
Collins.

limitation to *William Bliss* and his heirs, during the life of the said *Edward Bliss* upon trust for him; with remainder to the use of the said *Edward Bliss*, his heirs and assigns for ever, and, as for and concerning the said messuage or tenement adjoining the last mentioned messuage or public house, called the *White Bear*, with the appurtenances; and as concerning the said yearly rent of 25*l.* 10*s.*, residue of the said entire rent of 65*l.* 10*s.* reserved by the said lease, together with all powers reserved in the said lease for recovering the entire rent, to the use of *William Bliss*, his heirs and assigns for ever. By lease and release, bearing date respectively since the date of the last mentioned indentures, the release being between *Edward Bliss* of the first part, *William Bliss* of the second part, and *James Collins* of the third part, the said messuage or tenement, and public house called the *White Bear*, with the appurtenances, and also the yearly rent of 40*l.*, part of the entire rent of 65*l.* 10*s.* reserved by the said indenture of lease, together with all powers and remedies reserved in the said lease for recovering the rent of 65*l.* 10*s.*, so far as such powers relate to the apportioned rent of 40*l.* were appointed, limited, and conveyed by *Edward Bliss* and *William Bliss*, unto, and to the use of the said *James Collins*, his heirs and assigns for ever.

The question directed by the Vice-Chancellor for the opinion of this Court was, whether the purchaser of the estate in question had, by the aforesaid conveyance of the vendor and his trustee alone, without the concurrence of the lessee, acquired the same rights and remedies against the lessee in respect of the apportioned rent of 40*l.* therein reserved to him, as he would have acquired in case no rent had been mentioned in such con-

veyance

title to the apportioned rent without the consent of the tenant, and intimated a very strong opinion that the purchaser of part would have the same remedies for the apportioned rent as the original landlord would have had for the entire rent.

The Court, after hearing *Sugden*, stated that they thought it necessary to confer with the Vice-Chancellor before they heard the case further argued. In last term it was again argued by

Preston for the plaintiff. It may be admitted that, consistently with the authorities, the rent could not be apportioned by a vendor and purchaser so as to bind the tenant. The purchaser, however, has the same rights and remedies against the lessee in respect of the apportioned rent as he would have had in case no rent had been mentioned in the conveyance from the vendor, and the annual rent of 40*l.* had been apportioned by a jury. It is clear that a rent may be apportioned; *Co. I. Inst. 148.*; *2 Inst. 504.* and *Bacon's Abr. tit. Rent, M.* are authorities in point. The passage in *2 Inst. 504.* is full and explicit: "If a man make a lease for years, reserving a rent, if he grant away part of the reversion, the rent shall be apportioned by the common law, and albeit the grantee of part demand or claim more in his action of debt or avowry than is due, yet shall he recover so much as the jury shall find upon a just apportionment to be due." And for this, four reasons are given. "1st, For, that it is a rent-service, and not a bare contract, and rent services were apportionable at the common law. 2d, It is incident to the reversion, which is severable et accessorium sequitur naturam sui

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*Bliss
against
Collins.*

reserving 30*l.* rent, and afterwards *A.* devises 20*l.* of the rent to three of his sons, equally to be divided; this is a good devise, and each of the sons shall have an action of debt for his third part, though the reversion to which the rent was originally incident remains entire." Now, in the case put, the lessor divides the rent by his own act only, and he might divide it into as many parts as he pleases, obliging the tenant to pay each separately, and rendering him liable to different remedies. This power, of apportioning the rent by the lessor, will be beneficial to the tenant, by preventing the necessity of an action of debt for the purpose of having the apportionment made by the jury. And it is observed by Lord Ch. B. Gilbert, that the apportionment imposes no hardship on the tenant; for, though it subjects him to several actions and distresses, he may always avoid them by punctual payment.

1822.

Bills
against
Cullens

Chitty, contrà. The apportionment can only be legally made by the lessor, with the consent of the lessee, or by the verdict of a jury. It cannot even be made by the Court. This is so laid down in *Bacon's Abr.* tit. *Rent*, M, where all the authorities are collected. Indeed, if this apportionment be valid, how is the tenant to know what sum he is to tender to the person claiming the rent? If the reversion belongs to two tenants in common, the tenant cannot discharge himself against one by paying too much to the other; but the former may distrain. *Harrison v. Barnby.* (a) If this apportionment is valid, the tenant may, without notice, pay too much to either. It is clear that if there be a right of re-entry reserved to the purchaser of part of the premises, he cannot

(a) 5 Term Rep. 246.

1822.

ARDEN *against* CONNELL.

DEBT for use and occupation, in the Palace Court. Judgment by default. The prothonotary of that court would only permit interlocutory judgment to be signed, and expressly refused to suffer the plaintiff to enter up final judgment; and, on an application to the judge of that court, he refused to interfere.

In debt for use
and occupation
after judgment
by default:
Semble, that a
writ of enquiry
is necessary be-
fore signing
final judgment.

Thesiger now moved for a mandamus to the judge of that court, requiring him to permit final judgment to be signed; and he contended, that by the general practice in actions of debt, the plaintiff was entitled to have final judgment. In writs of enquiry the jury were sworn to assess the damages between the parties; but in debt nominal damages only were given. A writ of enquiry was, therefore, nugatory, and of course an interlocutory judgment would be irregular.

HOLROYD J. (a) It is not true, as an universal proposition, that in debt, where the defendant suffers judgment by default, the plaintiff is entitled to final judgment without executing a writ of enquiry. In actions on the stat. of *Edw. 6.* for not setting out tithes, there must be a writ of enquiry to ascertain the value of the tithe; so, in an action of debt for foreign money, a jury must find the value of the money. In the old form of declarations of debt, the contract stated was, that *A.* sold to *B.* a horse for a particular sum; and if the defendant suffered judgment to pass by default, he was considered

(a) The only Judge in Court.

of a plea exactly similar to that which is pleaded in the present case, and Lord C. B. *Comyns* refers to it, as an authority for the principle above mentioned. In *Holland v. Jourdine*, 1 *Holt, N.P.C.* 6., Lord C. J. Gibbs expressly ruled that payment by a defendant, of the debt *and costs*, after action brought, although he held a receipt for the sum paid, was no answer to the action under the *general issue*, but was the subject matter only of a special plea. In *Sullivan v. Montagu* (*a*) it was conceded in argument, that a matter of defence arising after action brought, might be specially pleaded. The plea in the present case is in accordance with this rule, and by shewing that payment was made in discharge of the promises and undertakings mentioned in the declaration, offers a sufficient answer in law to the action. It is true that the plea does not allege payment of the damages, accruing by reason of the non-performance of the promises and undertakings in the declaration; but that omission is supplied by the plaintiff's acceptance of the sum tendered to him, and having so elected to take that sum in discharge of the claim set out in the declaration, he is thereby precluded from taking the objection that a larger sum ought to have been paid. In *Perry v. Odingsell* (*b*) the defendant pleaded payment of the debt only. It is not usual, in ordinary pleas of payment before action brought, to aver that the money was paid in satisfaction of the damages. This is similar to the plea of *solvit post diem* to debt on bond, which has been decided to be a good bar, although the payment of interest was not alleged. It does not appear from the replication that any further sum was due, and the presumption is in favour of the defend-

1822.

 FRANCOIS
against
CAYWELL.
(*a*) *Dougl.* 109.(*b*) 4 *Mod.* 250.

but not of satisfaction. In covenant for non-payment of rent, riens in arrear is a bad plea, because it confesses the covenant to be broken, and tends only in mitigation of damages. Here, upon the whole record, it appears that the plaintiff had a cause of action, in respect of which, he has sustained a damage which is yet unsatisfied. The defendant ought to have pleaded that the money was paid in satisfaction of the damages sustained by the non-performance of the promises.

1892.

 FRANCIS
against
CAYWELL.

Judgment for the plaintiff.

JAMES and Wife against TALLENT.

*Friday,
June 21st.*

DEBT against the defendant as executor of one *Packard*, deceased, upon a bond given by the latter to *Susanna James*, while she was sole and unmarried, for 500*l.* The condition set out in the declaration recited, that *John Packard* had for several years cohabited with the said *Susanna*, then *S. Danby*, and had by her two children, *G. Danby* and *L. Danby*, and that she being desirous to put an end to such connexion, had requested *Packard* to make a suitable provision for herself and children, which he had agreed to do; and that she, at the request of *Packard*, had procured two sureties to enter into a bond to indemnify him against molestation; and that, for the purpose of making the provision, *Packard* had agreed to enter into the bond declared upon, the condition of which was declared to

The condition of a bond recited that the obligor had cohabited with a woman for several years, and had by her two children therein named, and that she being desirous to put an end to the connexion, had applied to the obligor to make a provision for herself and children, which he had agreed to do, and for that purpose the obligor entered into the bond in question, which was conditioned to pay to the mother yearly,

during the joint natural lives of herself and two children, a certain sum therein mentioned, the annuity to be applied to the maintenance and education of the children as well as of herself; or in case of the death of the two children therein specifically named, then the same annuity was to be payable to her during her life. One of the children died during the lifetime of the mother: Held, that the annuity was payable to her during her life at all events.

be,

CASES IN TRINITY TERM

1822.

JAMES
against
TALLANT.

be, that if *Packard* should pay to *Susanna* yearly, at the time of the joint natural lives of *S. Danby*, *G. Danby*, and *L. Danby*, an annuity of 30*l.* payable by equal payments as therein mentioned, the said sum to be applied to the maintenance, clothing, and cation of the said *G. Danby* and *L. Danby*, as well as for the maintenance and support of *Susanna Danby* in case of the death of the said *G. Danby* and *L. Danby*; if *Packard* should after that event happened, pay the said *Susanna Danby* yearly, during her natural life, an annuity of 30*l.* on the days therein before mentioned or if during the payment of the first mentioned annuity the said *S. Danby* should molest or interrupt the *Packard*, then the obligation should be void. But that after the death of *L. Danby*, but during the time of the said *G. Danby*, and the said *Susanna Danby*, to wit, on the 25th December, 1821, the sum of 7*l.* of the annuity became due, which the defendant was to pay. Plea, that *Packard*, in his lifetime, well truly paid the annuity during the joint and natural lives of *Susanna Danby*, *George Danby*, and *L. Danby*, and that in the lifetime of the said *G. Danby* and before the said sum of 7*l. 10s.* became due to the said *S. Danby* the said *Louisa Danby* died, and that *G. Danby* is now living. To this plea there was a general demurrer.

Chitty, in support of the demurrer, contended that it was the manifest intention of the parties that the annuity should be payable to *Susanna Danby* at all events during her life. The contrary construction would give the mother an interest in the death of the surviving son.

child ; because, until that event happened, the annuity would not be payable at all.

1822.

 JAMES
against
TALLENT.

Robinson contra. The words of the bond are set out according to the legal effect, not the tenor ; and the breach assigned does not correspond with the condition, that is, that *Packard*, during the joint lives of *Susanna Danby*, *George Danby*, and *Louisa Danby*, should pay to *S. Danby*, yearly, an annuity of 80*l.*, or in case *George Danby* and *L. Danby* die, he should pay another annuity to *Susanna Danby*. The first annuity is to be payable only during the continuance of the three joint lives ; the second is to be payable only on the determination of two of the lives. The breach assigned is, that after the death of *L. Danby*, and during the lives of *Susanna* and *George Danby*, the defendant did not pay. Now the breach is not within the condition, either in terms or effect ; for joint lives mean the lives of all ; and in case *G. and L. Danby die*, means in case both of them die. If the argument on the part of the plaintiff be well founded, he might have set out the effect of the bond to be according to the fact that has happened. He might have stated that the condition of the bond was, that if *Packard*, during the lives of *Susanna* and *George Danby*, should pay, and averred that *Susanna* and *George* were living ; and if the defendant had pleaded non est factum he would, according to the plaintiff's argument, have been entitled to recover. If, on the other hand, the defendant would have had judgment on that plea, he must have judgment now, because the breach does not come within the meaning of the condition. The defendant's plea is good, for it is, in the first part, a plea of performance in the very words

of

1822.

 JAMES
against
 TALLEY.

of the condition ; and as to the second part, it is that that condition precedent has not taken place out of which the obligation does not arise.

ABBOTT C. J. We must look at the whole instrument, and must put such a construction as will answer the manifest intention of the parties. Here the annual sum is the same, and is payable on the same days in every event ; and the object appears to be the recital of the bond to have been to provide for the mother as well as for the children ; and if both children die, the mother is to have the annuity for life. It appears to me, therefore, to have been the manifest intention, that the annuity should be paid at all events during the life of the mother. That being so, I think that the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff.

Friday,
June 21st.

Cox against BUCKNELL.

Where a plaintiff had issued one writ against three defendants for separate causes of action, and after delivering three separate declarations de bene esse, entered one common appearance according to the statute for all the three defendants, and signed three interlocutory judgments as for want of a plea : that this was irregular.

CAMPBELL moved to set aside the judgment in the case for irregularity, with costs. There was one writ issued against the defendant and three persons for separate causes of action. The plaintiff filed separate declarations conditionally against the defendant and two of the other persons to plead within four days of this term, and three separate rules to plead were given. Subsequently to this, on the 12th

June, the plaintiff's attorney filed one common appearance, according to the statute, for all the three defendants, and signed three separate interlocutory judgments for want of a plea. This, he contended, was irregular, inasmuch as the plaintiff could not enter one common appearance after having delivered three separate declarations *de bene esse*.

1822.

Cox
against
BUCKNELL.

Mauls shewed cause in the first instance. If the defendants might have appeared jointly, and put in the same bail, the plaintiff, under the statute, may enter one joint appearance for all three. And they clearly might so have done, for till the declaration of the plaintiff they cannot tell whether he means to declare jointly against all or not.

ABBOTT C.J. This rule must be absolute. It is unnecessary to say whether a joint appearance before declaration delivered would be irregular or not. But after separate declarations it clearly would be so. This case is a *fortiori*; for here the plaintiff, after delivering separate declarations, has himself entered a joint appearance.

Rule absolute.

Campbell then applied for the rule to be absolute, with costs; but as it appeared, that in the notice of motion given to the plaintiff's attorney, it was stated that application would be made to set aside the writ, and all subsequent proceedings for irregularity, the Court refused the costs, inasmuch as it clearly appeared that the writ was regular.

1822.

*Tuesday,
June 25th.*

The KING against JAMES.

A commitment for a contempt, being a commitment for punishment, must be for a time certain, and consequently a commitment for a contempt till the defendant is discharged by due course of law, is bad.

CAMPBELL, on a former day, moved for a writ habeas corpus to the keeper of the gaol for county of *Caermarthen*, to bring up the body of the defendant, on the ground that he had been illegally committed, by two justices of the peace, for contempt, under the following warrant of two justices: "Receive in your custody the body of *Thomas James*, sent by us, so charged by us, upon view for insulting behaviour towards us, by telling us that we were biassed and prejudiced in our conduct towards him as magistrates, the due execution of our office as magistrates of the county of *Caermarthen*, and keep him in custody until he shall be discharged by due course of law." I contended, first, that justices of the peace, not sitting in a court of sessions, had no power to commit for a contempt; and, secondly, upon the facts disclosed in his affidavit, that the defendant had not been guilty of any contempt for which he could lawfully be committed. In addition to these objections, there was a third which appeared upon the face of the warrant. For, at all events, as this was a commitment for punishment, it ought to have been for a time certain, and as there was no course of law by which the defendant could be discharged, such a commitment, if valid, amounted to perpetual imprisonment.

ABBOTT

ABBOTT C. J. Without giving any opinion upon the power of a justice of peace to commit for a contempt, this warrant appears to us to be bad, for not committing for a time certain. Take the writ.

1822.

The KING
against
JAMES.

The defendant being now brought up, under the *habeas corpus*, *Campbell* moved that he might be discharged.

Taunton appeared for the magistrates, and stated, that he had affidavits of the facts of the case, to shew the nature of the contempt, and that he meant to contend, that the magistrates were justified in committing for a contempt.

ABBOTT C. J. Supposing a contempt to have been committed, and the magistrates to have had power to commit for the contempt, can you contend that a commitment in this form is valid?

Taunton admitted that he could not support the validity of the warrant.

Defendant discharged. (a)

(a) See 2 Hawk. P. C. c. 1. s. 16. *Rex v. Darby*, 3 Mod. 139. *Regina v. Wrightson*, Salk. 698. *Rex v. Revel, Strange*, 420. *Petet v. Addington, Peake, N.P.C.* 62. *Mayhew v. Locke*, 7 Trant. 63. *Bushell's case, Vaughan*, 158. *Rex v. Clement*, 4 B. & A. 218.

Gurney and *Lawes* shewed cause. They referred to *Hoar v. Mill* (*a*), where the plaintiff was nonsuited on a very unimportant variance between "storehouse" and "storehouses." And yet the Court afterwards refused a similar application to the present. (*b*) At any rate, the amendment should be confined to this particular error, or otherwise the plaintiff will be at liberty to remodel his declaration altogether.

Scarlett and *Reader*, contra. Amendments of this sort have lately been allowed by the Court. And they referred to *Halhead v. Abrahams* (*c*), where a similar application was allowed by the Court of Common Pleas. And as this is on payment of costs, the Court will grant leave to amend generally.

Per Curiam. This rule must be absolute upon payment of costs. The plaintiff should be at liberty to amend his declaration generally, and the defendant may then either plead de novo or demur to the declaration, according as he may be advised.

Rule absolute accordingly.

(*a*) 4 *M. & S.* 470.

(*b*) This does not appear by the report, but it was certified to the Court by *Gasclee*, of counsel in that cause.

(*c*) 3 *Taunt.* 81.

1822.

WILLIAMS
against
PRATT.

only for work and labour, and money expended on behalf of the defendant, and they consist partly of disbursements by the steward, and partly of his necessary expences, and there are no fees or allowances to the steward for granting leases, &c. This, therefore, was not business connected with his professional character as an attorney.

1822:
—
Luxmore
against
LETTEREISER.

Coleridge contra, was stopped by the Court.

Per Curiam. We think this was business done by the plaintiff in his professional character as an attorney. The office of a steward of a manor is one usually so filled, and requires legal knowledge. These charges must therefore be subject to taxation under the circumstances of this case.

Rule absolute. (a)

(a) See *In re Aitken*, 4 B. & A. 49. *Hill v. Humphreys*, 2 *Eas.* & *Pull.* 345. *Marshall's case*, 2 *Blacks.* 972. *Ex parte C. C. College*, 6 *Trent.* 105., and *Sayer's Rep.* 223.

The KING against The LONDON Assurance
Company.

Tuesday,
June 25th.

PULLER applied to the Court for a rule nisi for a mandamus to the defendants, requiring them to permit a transfer to the assignees of *Timbrell*, a bankrupt, of eighty shares in the capital stock of the corporation then standing in their books in the bankrupt's name. The affidavits stated, that a commission issued against *Timbrell*, who was then in partnership with two

The Court will not grant a mandamus to a private trading corporation to permit a transfer of stock to be made in their books.

estates, and in *Middleton's* case (*a*), a mandamus was granted to restore *Middleton* to the treasurership of the *New River* Water Company. It appears, therefore, that the Court have interfered in private corporations. Here, the assignees have no remedy at law, unless the Court grant this rule, and in *Rex v. The Marquis of Stafford* (*b*), *Buller* J. lays it down, "that a party applying for a mandamus must make out a legal right; though, if he shew such legal right, and there be also a remedy in equity that will be no answer to the application." Here, the assignees have a legal right, as representing the bankrupt to a transfer of these shares. In the case of *Rex v. The Bank of England* (*c*), there was no legal right on the part of the applicant. That case is, therefore, distinguishable from the present.

Per Curiam. We are not aware of any instance of a mandamus like the present having ever been granted, and if we were to grant this, we should be called upon to interfere in all cases of dispute between the members of private corporations. This company, although carried on under a royal charter, is a mere private partnership. But the writ of mandamus is a high prerogative writ, and is confined to cases of a public nature. The rule, therefore, must be refused.

Rule refused.

(*a*) 1 *Sidg.* 169. 1 *Lev.* 123. & C.

(*b*) 3 *T. R.* 651.

(*c*) 2 *B. & A.* 620.

1822.

The King
against
The London
Assurance Co.

1822.
—

ABRAHAM against PUGH.

*Wednesday,
June 26th:*

GASELEE shewed cause against a rule to stay the proceedings in an action on a judgment pending a writ of error on that judgment. At the time the rule nisi was obtained, bail had not been put in and perfected, but before cause shewn, that had been done. He contended that the defendant had no right to make the motion till bail had been put in and perfected, and therefore the rule must be discharged, and cited *Smith v. Shepherd* (a), and *Bicknell v. Longstaff*. (b)

No motion can be made to stay the proceedings in an action on a judgment pending a writ of error, until bail have been put in and perfected,

Scarlett and Chitty, contra, contended that the cases were distinguishable on the ground that here the bail had now been perfected.

Per Curiam. That is immaterial; we are to look to the state of the circumstances at the time the rule was obtained; and we think, that in order to expedite proceedings in error, it is at all events right to hold, that a party shall not be allowed to make any motion under such circumstances until he has put in and perfected his bail.

Rule discharged with costs.

(a) 5 T.R. 9.

(b) 6 T.R. 155.

the letter, or alleged that the debt had arisen subsequently to it.

Per Curiam. Our opinion is entirely founded upon that letter, in which the plaintiff speaks of the defendant's firm as his principal creditors: now that letter he could not but have denied, unless it were genuine. We do not dispute, that in general the rule is as stated by the plaintiff's counsel, but we think this an exception. Our discharging the present defendant, will not however afford a precedent for many motions of the kind in future.

Rule accordingly.

Note. It being afterwards suggested that the letter, which was in Italian, did not bear the interpretation put upon it, that question was referred to the master.

1822.

NIZETICH
against
BONACIE.

WHITE against GOMPERTZ.

Wednesday,
June 26th.

*C*HITTY had obtained a rule nisi for setting aside the last detainer of the defendant in this cause, and all proceedings thereon with costs. The affidavits in support of the rule stated, that on the 30th of *May*, a detainer was lodged against the defendant, then a prisoner in the King's Bench, for 1785*l.* And on the 31st of *May*, this defendant was discharged as to this detainer, and a fresh detainer lodged for 1180*l.* only. The plaintiff on the same day served a notice to discontinue the first action on payment of costs, and on 1st *June*, the costs were taxed and paid. The defendant was previously in custody in execution for 317*l.* at the suit of another person. The affidavits on the other

Where a defendant being previously in custody in execution for a debt a detainer was lodged against him, but for too large a sum, and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer. Held that this second detainer was regular, and that it was not like the case of a

of a fresh arrest, which cannot be made till the costs have been paid,

side

1822.

 Wm. v.
 against
 Gloucester.

side stated, that it was merely a mistake, and that few hours after it was discovered, notice was sent to Marshal, that the defendant was only to be detained 1180*l.*, and on the next day the discontinuance place.

Denman shewed cause, and contended that this not the case of a new arrest, but only a correction of the former one. And here the defendant has sustained no inconvenience, for the mistake being discovered notice of it was immediately given to the Marshal.

Chitty contrà. Here the defendant has been detain for several hours on a debt of 1785*l.*, whereas he ought to have been detained for only 1180*l.*; and in order obtain the rules, he must give security to the Marsh which is thereby altered. He cited *Molling v. Bu holtz* (a), which was the case of an arrest upon a sum of money, and contended that there was no distinction between that cause and the present.

The Court were, however, of opinion, that the causes were distinguishable. Here the defendant was previously in custody. This is merely rectifying a mistake in the amount for which he was detained, which might have been done without discontinuing. And the plaintiff is not to be prejudiced by having discontinued, and thereby placed the defendant in a better situation.

Rule discharged with cost

(a) 3 M. & S. 153.

1822.

BLACKHURST *against* BULMER.Wednesday,
June 26th.

THIS case stood No. 90. in the printed list at the sittings in term; the defendant's counsel objected to its being tried out of its turn, and declined to appear for the defendant. The written list of causes, affixed in the usual way on the outside of the court, did not extend beyond No. 26. of the printed list. The cause was however tried by *Best J.* on the ground stated to him, that there was no substantial defence to the action; and that there were witnesses for the plaintiff remaining in town on purpose, whose residence was in *Lancashire*. No affidavit of merits was now produced in support of the application.

Where a cause stood in the paper below the last cause mentioned in the written list affixed at the outside of the court, and was tried (being stated to be an undefended cause) the counsel for the defendant objecting to it, and declining to appear. Held that the trial was regular, and the Court refused a new trial, there being no affidavit of merits.

D. F. Jones now moved for a new trial in this case, and contended that the trial was irregular. The present case goes a great deal further than *Foudrinier v. Bradberry* (a), for if this verdict can be supported, any cause in the printed list at whatever distance, may be taken, and a defendant applying to set aside the verdict, may be compelled to swear to merits. If this be so the written list would have the effect of misleading instead of assisting the persons interested. Besides, if this be regular, both counsel and attorneys will be obliged to attend during the whole of the sittings de die in diem, and the uncertainty will also be most inconvenient both to parties and witnesses.

(a) 3 B. & A. 322.

ABBOTT

months, and still resided there; and that deponent did not believe that the plaintiff had any intention of leaving the kingdom, as he had often told him (the attorney,) that he had not. The affidavit further stated, that the defendant had sued out a commission of bankrupt against him, which being disputed by the plaintiff, the Vice-Chancellor ordered the plaintiff's petition to stand over, with liberty to him to bring an action at law, to try the validity of the commission, and that the present action was accordingly brought for that purpose.

1822.

 OLIVA
against
JOHNSON.

D. F. Jones now shewed cause. The defendant is not entitled to demand security for costs. In *Porrier v. Carter* (*a*), it was held that a plaintiff is not compellable to find security for costs, on the ground of his being a foreigner, if he reside in England: and in *Maria v. Hall* (*b*), the Court adopted the same rule even where the plaintiff was not voluntarily resident here, but was a prisoner at war, actually confined in prison; nor will the Court require security for costs on the ground of the plaintiff being a bankrupt, *Anonymous* (*c*). Besides, it is a decisive answer to the present application, that this is an action brought in pursuance of liberty granted by the Vice-Chancellor, upon the hearing of a petition in bankruptcy, for the purpose of trying the validity of the commission. In *McCullock v. Robinson* (*d*) the Court of Common Pleas decided, that security for costs could not be required in an action of this kind, even though the plaintiff with all his family were at the time gone to reside at *New York* in *North America*. It would be most unreasonable to stay proceedings until security

(*a*) 1 *H. Bl.* 106.

(*b*) 2 *Bos. & Pul.* 236.

(*c*) 2 *Taunt.* 61.

(*d*) 2 *New Rep.* 352.

given,

1822.

 Oliva
against
 Johnson.

given, when the defendant has taken all the plaintiff property under the commission, and when his right to take the property is the distinct object of the action.

Parke contra, having observed that this was a action brought not by the *direction* of the Vice-Chancellor, but merely in pursuance of liberty reserved, the petition being ordered to stand over in the mean time was stopped by the Court.

Per Curiam. As to the first point, the *affidavit* is not sufficient: it should go further, and state that the plaintiff has been, and is now a resident in this country, and that he *intends to continue to reside here*. As to the second point, the case of an action brought by the direction of the Vice-Chancellor, differs widely from that of an action brought merely in pursuance of leave or liberty reserved. If this had been a case of the former kind, it would have been distinctly within the authority of *McCulloch* and *Robinson*. But as it is, the plaintiff may apply to the Vice-Chancellor for his directions, as to security for costs being or not being required: we cannot take this case out of the general rule.

Rule absolute

MEASURE *against GEE.*

A testator devised certain estates to his daughter for life, and after her decease to her son *A. B.* an infant, for life, and after the determination of that estate by forfeiture or otherwise to trustees, to preserve contingent remainders, but to permit *A. B.* to receive the profits during his life, and after the decease of *A. B.*, then to the heirs of his body for ever, with a devise over in case of the failure of his issue: Held that *A. B.* took an estate tail in remainder.

THE following case was sent by the Vice-Chancellor for the opinion of this Court.

On the 3d May, 1792, *John Hardy* made his will,

duly

duly executed to pass freehold estates, and in the will were the following clauses. And as to my real and personal estate, I give and devise the same in manner following, (that is to say,) "First, I give and devise unto my grand-daughter, *Ann Alcock*, and to her heirs and assigns for ever, all those my arable, meadow, or pasture lands, hereditaments and premises, situate, lying and being, in *Leverington*, in the isle of *Ely*, in the county of *Cambridge*, which I purchased of the trustees of Mr. *Daniel Swaine*; but in case it shall happen, that my said grand-daughter, *Ann Alcock*, shall depart this life unmarried, and without issue of her body lawfully to be begotten, then I give and devise the said arable, meadow, or pasture lands, hereditaments, and premises unto my daughter *Ann*, the wife of *William Tatam*, her heirs and assigns for ever. Also I devise unto my said daughter, *Ann Tatam*, all the residue and remainder of all my freehold and copyhold messuages, lands, &c. and with their and every of their rights and appurtenances, the copyhold part thereof I have duly surrendered to the use of this my last will, to hold the said freehold and copyhold messuages, lands, &c. with their appurtenances, unto my daughter, *Ann Tatam*, for the term of her natural life; and after her decease, then I give the said messuages, lands, &c. with their appurtenances, unto *John Tatam*, an infant, the only son of my daughter, *Ann Tatam*, for the term of his natural life; and after the determination of that estate by forfeiture or otherwise, then I give and devise the said messuages, lands, &c. with their appurtenances, unto *Henry Boulton* and *James Measure*, and their heirs, during the life of the said *John Tatam*, upon trust to

preserve

1822.

MEASURE
against
Cm.

ley (*a*), *Goodright v. Pullyn* (*b*), and *Coulson v. Coulson* (*c*), are the more relevant authorities. In the last case the devise was to *Robert Coulson* for life; remainder to trustees during his life, to preserve contingent remainders; remainder to the heirs of the body of *Robert Coulson*. It was held, that by the devise to the heirs of his body, he took an estate tail; and the authority of that case was confirmed by the decision in *Hodgson v. Ambrose*. (*d*) But the case of *Goodright v. Pullyn* (*e*) is the authority more immediately applicable. The language of the Court there is full, clear, and precise in favour of the plaintiff, and shews that these limitations created an estate tail. In that case, and also in *Shelley's* case (*f*), from which the general rule derives its denomination, there were words of superadded limitation; and whether the second gift be to heirs males of the body and their heirs males of their bodies, or their heirs of their bodies, or their heirs, does not prevent the application of the rule. These words of superadded limitation will convert the words "heirs or heirs males of the body," into words of purchase or designation. In all these cases the words of superadded limitation were rejected, as far as they did not quadrate with the intention of creating an estate tail, by means of the words "heirs or heirs male of the body." So in this case, the words "his, her, and their heirs for ever," must be discarded. The words of limitation over establish the general intention, that *John Tatam* was to be the stock of the family and the donee in tail. In

1822.

 MEASURES
against
GZR.
(*a*) 2 *Ld. Raym.* 873. (*b*) 2 *Ld. Raym.* 1437.(*c*) 2 *Aik.* 247.(*d*) *Dougl.* 337.(*e*) 2 *Ld. Raym.* 1437.(*f*) 1 *Rep.* 93.

of such children." In *Gretton v. Howard* (*a*) the devise was to the testator's wife, of all his real estate, she first paying his debts and funeral expences, and after her decease to the heirs of her body, share and share alike, if more than one; and in default of such issue, to be begotten by testator, to be at her own disposal. There being children of the testator and his wife, it was held, that the wife took only an estate for life, with remainder to the children, as tenants in common in fee. In *Doe v. Goff* (*b*), the testator devised an estate to his wife for life, and after her decease to his daughter *Mary*, and to the heirs of her body, to be begotten, as tenants in common, and not as joint-tenants; but if such issue should die before she or they attained 21, then to his son *Joseph*, in fee; and then he devised another estate to his wife for life, remainder to his son *Joseph*, and the heirs of his body, begotten or to be begotten; but if he died without issue, or such issue all died before he or they attained 21, then to his daughter *Mary*, and the heirs of her body, begotten or to be begotten, such issue, if more than one, to take as tenants in common. It was held, that the daughter *Mary* took only an estate for life in the first estate, with remainder to all her children equally as purchasers. In *Merest v. James* (*c*) there was a devise of freehold and copyhold lands to trustees, for the use of the testator's daughter for life, and after her decease, then to the use of the issue of her body, lawfully begotten; and in default of such issue, or in case none of such issue lived to attain the age of 21 years, then as to the lands at *H.*, over to the devor's brother *S.* for life, and after his decease, to the

1822.

M. & J. v. S.
against
G. & C.(*a*) 6 *Taunt.* 94. (*b*) 11 *Eas.*, 668. (*c*) 1 *Brod. & B.* 484.

1822.

 MEASURE
against
 GEE.

use of the issue of his body, or in default of such or in case none of such issue lived to attain 21 then to devisor's brother *H.* for life, and after I cease, to the issue of his body, lawfully begotte in default of issue, then to devisor's sister, *E.*, he and assigns for ever; and as to the lands of *W.* the death of his daughter without issue, or if issu should not live to attain 21 years, to his broth his heirs and assigns; and after the death of his da without issue as aforesaid, all the messuage at *S.* sister *E.*, her heirs and assigns: It was held, th daughter took an estate for life in the premises. decision must have proceeded on the ground, upon the whole, the testator, by the word *issue children.* Now, here the case differs from *Hodge Ambrose*, for not only is there a limitation to pr contingent remainders, but there are superadded of limitation to the gift to the heirs of the body. case, therefore, falls within the later authorities w have cited.

ABBOTT C. J. In all the cases cited by the dant's counsel, a manifest intent appeared on the f the will, that the children should take different int from estates tail. We will, however, consider the and send our certificate.

The following certificate was sent:

This case has been argued before us, and we s opinion, that *John Tatam*, the son, took an estate in remainder in the premises named.

C. ABBOTT.

G. S. HOLE

W. D. BRY

1822.

LOWE against Sir WILLIAM MANNERS, Bart.

THE Vice-Chancellor sent the following case for the opinion of this Court. *Richard Lowe* being seized in fee simple of an undivided moiety of the *North-Witham Wood*, and of several closes in *North-Witham* and elsewhere in the county of *Lincoln*, and of other freehold estates, duly made and published his last will in writing, bearing date the 5th day of *February*, 1781, and duly executed and attested, so as to pass freehold estates, and amongst other things devised as follows: “ I give all my landed estates in the different counties of *Derby*, *Bedford*, *Lincoln*, *Wilts*, and *Middlesex*, to my three friends, *E. Mills Mundy*, *Robert Williams*, and *Kempe*

R. Lowe, by will, devised all his landed estates to trustees, and bequeathed 10,000*l.* as a portion to his daughter, *C. L.*, but in case she should marry any one of his three kinsmen named in the will, he gave to whichever of them she married certain estates therein specified, he taking the name of *Lowe*, and settling upon her an

annuity of 1000*l.* a year during her life, and in case that circumstance did not take place with his daughter *C. L.*, he then directed that it might be offered to his other daughter, *A. L.* in every particular; and in case neither daughter should marry in the manner above mentioned, then he directed that his daughters should have 10,000*l.* each, and, in that case, he gave all his estates to *W. D.*, his kinsman, for ever, on his and his heirs taking the name of *Lowe* irrevocably. After the date of this will *C. L.* married one *W. H.*, who was not one of the persons named in the will who would have become entitled to the estate after she married him, and the testator paid her a marriage portion; and afterwards by a codicil to his will reciting her marriage, and that he had given her a fortune, he revoked all devises and bequests in her favour contained in his original will, and also all claim which her husband *W. H.* might have to any of his real and personal estates by virtue of his marriage with his daughter, *C. L.*, and by virtue of his said will, and in lieu thereof he bequeathed unto each of their children a pecuniary legacy, and he then directed that in case his other daughter should marry either of the persons mentioned in his will, then upon condition that either of those persons whom she married, and his heirs, would accept, take, and use the name of *Lowe only*, he gave all his real and personal estate unto such of those persons whom she married, and his heirs; and in case his daughter, *A. L.*, should not marry either of the persons mentioned in his will, or if she married one of them, and he refused to accept, take, and use the name of *Lowe*, in that case he revoked all his devises and bequests contained in his will and codicil in her favour, and in lieu thereof bequeathed her 10,000*l.* The testator died soon after the date of his codicil, and his daughter, *A. L.*, afterwards married *T. F.*, who was not one of the persons named in the will who would have been entitled to the estate in the event of her having married him, and upon that occasion the 10,000*l.* was paid to her, and *W. D.* then entered upon the testator's estates, and took upon himself the name of *Lowe*, and suffered a recovery: Held, that *W. D.* was seized of an undefeasible estate in fee simple in the estate in question.

S O 3

Brydges,

the sole use of the income only to the name of *Lowe* for ever; and should it so happen that neither of my aforesaid daughters should marry in the manner I have mentioned, or to some worthy, good man, of an estate in fee of not less than 500*l.* in land or real property, unincumbered of 10,000*l.*, I will that my said daughters have 10,000*l.* each, to be paid by my executors at such time as they or any two of them think proper. And then I give all my estates, both landed and personal, to my kinsman, *William Drury*, and his heirs male for ever, on his and his heirs taking the name of *Lowe* irreversably." After the date of the will, *Charlotte Layton*, otherwise *Lowe*, married *William Heath*, and upon that occasion *Richard Lowe* paid her a marriage portion. *Richard Lowe* afterwards made and published a codicil in writing to his will, bearing date the 25th day of *May*, 1785, part whereof was in the words following: "This is a codicil to the last will and testament of me *Richard Lowe*, Esq., and to be taken as part thereof. Whereas, in and by my last will and testament, bearing date the 5th day of *February*, 1781, I have appointed *Edward Miller Mundy*, *Robert Williams*, and *Kempe Brydges*, my trustees and executors. Now I hereby revoke that appointment; and I hereby appoint the said *Edward Miller Mundy*, together with *John Radford* and *Evan Lewis*, executors of my last will. And I devise and bequeath unto them and their heirs, all my real and personal estates, to hold to them and their heirs to the use of such person, and upon such events, and under such conditions, and subject to such charges as are mentioned and declared in and by my said last will and testament. And whereas, since the making of my said will, one of my daughters,

1822.

 Lowe
against
MANKERS.

1822.

Lowe
against
Marriage.

*Charlotte Lowe, otherwise Layton, hath inter-
with William Heath, Esq., on which marriage
my said daughter a fortune, therefore I do he-
voke and make void all the devises and beque-
tained in my said will for the benefit of my said
son, Charlotte Heath. And I do hereby also
and make void all claim and right which the said
William Heath might have to any of my real and
estates by virtue of his marriage with my said daugh-
ter, Charlotte Heath, and under and by virtue of any
or clause in my said will, or any construction
and in lieu thereof, I give and bequeath unto each
the children of the said William Heath, to be paid
on the body of my said daughter, (except an ex-
clusively son,) the sum of 2000*l.* to be paid to such of
them as shall be a son or sons at the age of 21 years,
such of them as shall be a daughter or daughters
at the age of 21 years, or day of marriage, which shall
happen. And I hereby charge my real estates with
payment thereof. And in case my other daughter
Ann Lowe, otherwise Layton, should marry either
of the gentlemen, and in the manner mentioned in
my will, then upon this express condition, that either
of those gentlemen whom she may so marry, and his
will accept, take, and use the name of *Lowe*, and
give all my real and personal estates, subject
to debts, funeral expenses, and legacies, and also sub-
ject to a rent charge of 1000*l.* per annum to my said daughter
*Ann Lowe, otherwise Layton, for her life, and inde-
pendent of her husband, unto such of those gentlemen*
as she may so marry, and his heirs. And in case
my said daughter, *Ann Lowe, otherwise Layton, shall*
choose to marry either of those gentlemen whom I*

ment

mentioned in my will for that purpose, or if she does marry one of them, and he should refuse to accept, take, and use the name of *Lowe*, in such case I hereby revoke all devises and bequests contained in my said will, and this my codicil to my said daughter *Ann*, and in lieu thereof I give and devise unto her 10,000*l.*, to be paid to her at the age of 21 years, or day of marriage, which should first happen. And I hereby charge my real and personal estates with the payment of the said 10,000*l.* and the interest thereof as aforesaid, and in all respects subject and conformable to this my codicil, I do confirm my last will and testament." Soon after the date of the codicil *Richard Lowe* died, and in the year 1789, *Ann Layton*, otherwise *Lowe*, married the honourable *Thomas Fane*, who, at the time of the marriage, had not an estate in fee of not less than 500*l.* in land or real property, unincumbered of 10,000*l.* And upon the occasion of that marriage, the portion of 10,000*l.*, given to her by the codicil of *Richard Lowe*, was paid to her out of his personal estate; and *William Drury* entered into the possession of the testator's undivided moiety of the said wood and woodlands, and closes, in the county of *Lincoln*, and of his other freehold estates, and took upon himself the name of *Lowe* in addition to the name of *William Drury*. In *Michaelmas* term, 1790, *William Drury Lowe* duly suffered a common recovery with double voucher of the said undivided moiety of the said wood, woodlands and closes, which recovery was declared to enure to the use of *William Drury Lowe*, his heirs and assigns. *William* and *Charlotte Heath*, and *Thomas* and *Ann Fane*, and *William*, *Thomas* and *John Drury*, and several sons of *Edward Miller Mundy*

are

1822.

*Lowe
against
MANNERS.*

CASES IN TRINITY TERM

1822.

 Lowe
 against
 Manners

are now living. The plaintiff, *W. D. Lowe*, contracted to sell the undivided moiety of the said wood, woldands and closes, to the defendant, Sir *William Manners*, and filed his bill in the High Court of Chancery against the defendant for a specific performance of the contract.

The question directed by the Vice-Chancellor for the opinion of this Court was, whether the plaintiff was possessed of an indefeasible estate in fee simple, or of an and what other estate in the undivided moiety of the land and hereditaments in question. The case was argued at the sittings before last Michaelmas term.

Sugden, for the plaintiff. The question is, whether the marriage which has taken place, operates as a cesse of the power to marry any of the persons designated in the will; or, whether the daughter may not take the estate hereafter by marrying one of those persons. It was the intention of the testator, that the daughter should at once make her election; and having once married a person not of the favoured class, she was to lose the estate. The daughter was to have a different interest under the will according to the person she married. She had an election given her, to marry one of the *Drurys*, and in that event her husband was to have the *Denby* and *Locke* estates on taking the name of *Lowe*, and settling on her an annuity of 1000*l.* But if she married a person not of the favoured class, then she was to have a fortune of 10,000*l.* By the codicil, the testator revoked the devise to one of his daughters, she having married a person not of the favoured class, and states that he had given her 10,000*l.*: and he then tenders to the other daughter, the option of marrying one of the favoured

class,

class, in which case her husband, after settling 1000*l.* per annum on her, is to have the estate on taking the name of *Lowe*. Then comes the clause which is decisive of the question in the cause. "And in case my said daughter shall not choose to marry either of the gentlemen whom I have named in my will for that purpose: or, if she marry one of them, and he should refuse to accept, take, and use the name of *Lowe*, then, and in such case, I revoke all devises and bequests contained in my will and codicil to my said daughter, and in lieu thereof, give her 10,000*l.* to be paid to her at 21 years of age or day of marriage, and until payment to bear interest." From the day of marriage, she was to be entitled to the fortune substituted in lieu of the estate to which her husband, if of the favoured class, would have been entitled. It is quite clear, that by the very act of marrying one not of the favoured class, she was to lose absolutely, all claim to the estate. The choice is only once tendered to her. Even if she did marry one of the favoured class, and he did not use the name of *Lowe*, the gift was revoked; and if she married any person not of the favoured class, the gift was also revoked. In *Hutcheson v. Hammond* (a), the testatrix gave her husband a power of appointing 3500*l.*, in case *Ann Jones* should during his life, marry without his consent. *Ann Jones* having married once with her father's consent, it was held that his power of appointment was gone.

Preston contra. The codicil cannot have any influence on the construction of the gifts in the will. If the will has not given effectually, the codicil does not supply

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(a) 3 Bro. Ch. Ca. 128.

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the defect. The first question is, whether the estate was vested. The second, whether the gift was consistent with the rules of law respecting perpetuities. Charlotte might have married before *Charlotte* lost her estate. The will does not impose on *Ann* the obligation of marrying during the life-time of *Charlotte*. In this case, during the whole period of *Charlotte's* life, the estate would not have vested in Mr. *Drury*. There is a material distinction between conditions which are to create an estate, and conditions which are to destroy or defeat an estate. The former are to be construed by construction of law as near to the words of the condition as may be, and according to the intention of the testator; and if the intention of the condition cannot be performed according to its terms, the gift will fail; but conditions that destroy an estate are to be taken strictly. In *Randal v. Payne*, the testator gave to trustees 4000*l.*, for the use of *Jane Wood*, if she should marry with consent of the trustees, then only 1000*l.*; also to the same trustees 400*l.* for the use of *Martha Wood*, if she should marry without consent, if not, only 1000*l.*; and if either of these should marry into certain families named, and her son, the testator gave his estate to that son for life, the remainder over; if they should not marry, the estate to *Randal* for life, and her son, in fee. This was filed, and there was a decree that the money should be invested in the funds till the event should happen. *Jane Wood* married with consent, but not into any of the favoured families; *Randal* filed a bill for the residue, which was forfeited to him; but the Lord Chancellor said, that they married nothing could vest, for marriage was

(a) 1 Bro. Ch. Ca, 55.

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condition precedent, then could any thing vest till the whole contingency became impossible? That suspends it during their lives. You suppose if they once married, they had lost all chance of marrying a *Rivington* or *Gosling*; if he had said so it would have been very well. Suppose the girls had married against consent, one of the husbands had died, and she had married into one of the favoured families, and had a son, and that son was here claiming the estate, the Court would not incline to refuse him." The bill was dismissed. Now that case is expressly in point. It is said that *Drury* takes the estate the instant the girls marry a person not of the favoured class. It is clear that no estate could vest in *Drury* until they both married. Did it then ever vest? Suppose one of the daughters married a person of the favoured class, and he refused to take the name of *Lowe*, the estate would not, on the marriage, vest in him; but he might take the name at any time during his life, and the estate would vest in him when he took the name. There is no reason, therefore, why the other part of the condition may not be performed at any time, during the life of the daughters. Secondly, this gift to Mr. *Drury* is void, because it has a tendency to a perpetuity; for it will not necessarily vest within 21 years after a life in being at the death of the testator. The gift is to a person not necessarily in esse; for the daughter may, 40 years after the death of the testator, marry a youth only 18 years of age, and who, consequently, was not in esse at the time of the testator's death. The gift is not to the daughters but to the persons whom they may marry, with a limitation over to *W. Drury*, on failure of effect of the former gift. *Pro-*

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tor v. The Bishop of Bath and Wells. (a) *Geeley* (b), *Leake v. Robinson* (c), are authorities upon point. This is a gift upon a contingency, and it have been suspended beyond a life in being, or 2 and was, therefore, void. The gift to the husband open to this objection. It follows, that the alternative substituted gift to Mr. *Drury* must be liable to the objection.

The following certificate was afterwards sent:

This case has been argued before us; and we opinion, that the plaintiff is now seised of an interest in fee simple, in the undivided moiety of the in question.

C. ABBOT

J. BAYLEY

W. D. B.

(a) 2 H. Bl. 358. (b) 1 Cor Rep. 324. (c) 2 Merrik

The KING against HARRIS.

An information for perjury, stated that defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and did say, swear, and give in evidence, &c. It then set out the evidence so given count then averred, that the defendant, at the bar of the House of Lords, being sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out his evidence, which was directly contrary given before the House of Commons, and concluded (after averments as to the persons and places referred to in the evidence on both occasions); and so the aforesaid do say that the said E. H. did commit wilful and corrupt perjury: Motion in arrest of judgment, that this count was bad.

mitting the offence after mentioned, to wit, at a session of parliament holden on, &c. at *Westminster*, in the county of *M.*, to wit, at the parish of *Saint Margaret*, within the liberty of *Westminster*, in the county of *M.*, a certain bill, intituled, "An act," &c. was pending before the Lords Spiritual and Temporal, which said bill recited, that there was the most notorious bribery and corruption at the then last election for the borough of *Barnstaple*, in the county of *D.*, and that such bribery and corruption was likely to continue and be practised in the said borough in future, unless some means were taken to prevent the same; and by which bill certain matters and things were proposed to be enacted, touching the election, to be thereafter had for burgesses to serve in parliament for the said borough: and that such proceedings were had upon the said bill in the said parliament before the said Lords Spiritual and Temporal, that afterwards, and during the said session of parliament, and before the committing, &c. to wit, on, &c. at, &c. It was ordered by the said Lords Spiritual and Temporal, amongst other things, that counsel should be at liberty to examine witnesses in support of the said bill. The count then stated, that the defendant, late of, &c. afterwards, to wit, on, &c., at, &c., did appear before the Lords Spiritual and Temporal, that is to say, at the bar of the said Lords Spiritual and Temporal, as a witness in support of the said bill, and that he was then and there sworn, &c. before the said Lords, &c., the said Lords, &c. having sufficient and competent power, &c. And that upon the hearing the evidence before the said Lords, &c. in support of the said bill, certain questions then and there arose and became and were material, that is to say, &c. The count

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then set out the questions, and the defendant's evi
before the House of Lords, and concluded by assi
the perjury as to each particular in the usual
The second and third counts were similar in form
first, differing only in the assignments of the pa
The fourth count stated, that heretofore, to wit, on
in the Lower House of parliament of the said late
then held at *Westminster*, to wit, at the parish of,
E. H. Esq., commonly called Lord Viscount &
J. M. Esq. &c., then being members of the La
House of parliament, were in due manner, according
the form of the statutes in such case made and p
vided, chosen, nominated, and sworn to be a se
committee to try and determine the merits of an e
tion of two burgesses to serve in the said parliame
&c., as burgesses for the borough of *B.*, in the cou
of *D.*, as of the return of, &c. as burgesses, &c. A
that the persons so chosen, &c., afterwards, to wit,
&c., at a certain place adjacent to the House of Co
mons, to wit, at, &c., did in due manner meet to
and determine the merits, &c. And that the defend
afterwards, to wit, on, &c. at, &c. did appear as a v
ness, touching the merits, &c. before the said pers
so chosen, &c. The count then stated his being d
sworn, and that he, being so sworn, "*deliberately &*
knowingly, and of his own act and consent, did say, sw
and give in evidence, &c." It then, after setting out
evidence before the committee of the House of Co
mons, proceeded to state, that heretofore, and bef
the committing, &c., to wit, at a session of parliame
holden on, &c., a certain bill, intitled, &c. was pend
before the Lords Spiritual and Temporal, &c.; and the
after stating, as in the first count, that the defendan

borough of *B.*, and the election, and the different persons named in the defendant's evidence before the House of Commons, and the borough of *B.*, &c. named in his evidence before the House of Lords, were the same borough of *B.*, &c., and not other and different. And then concluded: "And so the said Attorney-General says, that the said *Edward Harris*, to wit, at, &c. in manner and form aforesaid, did commit wilful and corrupt perjury to the great displeasure, &c." The fifth count varied from the fourth only in the statements of the evidence, which were different. The sixth and seventh counts were similar to the fourth and fifth, but added, that the questions in answer to which the respective evidence of the defendant before the Houses of Lords and Commons was given, were material questions. Plea, not guilty. At the trial, at the *Westminster* sittings after last *Michaelmas* term, before *Abbott C. J.*, the jury acquitted the defendant upon the first three, and found him guilty upon the last four counts of the information. A rule nisi was obtained in last *Hilary* term for arresting the judgment, on the ground that these counts were insufficient. (a)

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(a) The case of *Rex v. Knill*, which was precisely similar to the present, and growing out of the same transaction, and in which the indictment was in the same form, was tried on the same day; and the jury convicted the defendant on those counts which charged the perjury specifically to have been in the examination before the House of Lords. No evidence was given, except simply the proof of the contradictory oaths of the defendant on the two occasions. In that case *D. F. Jones* moved for a rule to shew cause why there should not be a new trial, on the ground that in perjury two witnesses were necessary, whereas in that case only one witness was adduced to prove the *corpus delicti*, namely, the witness who deposed to the contradictory evidence given by the defendant before the committee of the House of Commons: and he contended, that if this evidence were of itself sufficient, the danger intended to be provided against by the rule requiring two witnesses would be immediately let in, for one

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adopted. In *Rex v. Thorogood (a)*, it was held in the Common Pleas, that where a man confessed an affidavit made by him to be false, that Court might, under 5 Eliz. c. 9. s. 9., order him to be pilloried for perjury committed in the face of the Court. Yet there, as here, it would be impossible to say on which of the two occasions the perjury was committed. There are precedents of indictments in this form, one of which is to be found in a note-book of *Chambre J.* And *Yates J.* convicted a person at the *Lancaster assizes*, 1764, on an indictment in this form, supported by similar evidence as in this case, which conviction was afterwards approved by *Lord Mansfield C.J.* and *Wilmet* and *Aston, Js.*, to whom he mentioned the case. And there was another case at the *York assizes*, where a similar verdict was given, on an indictment containing a charge like the present, where the only evidence was the two contradictory depositions. As to the argument, that a defendant, if, after an acquittal on such a count as this, he should be subsequently indicted in the usual form for perjury committed before the House of Lords, could not plead *auterfoits acquit*, it is perhaps sufficient to say that it cannot apply to this individual case; for here he might so plead. But even if these counts objected to were the only counts in the information, the Court would probably consider the crown as having, in that case, elected to proceed in this way, and would, therefore, prevent them from taking further proceedings in the same matter. As to the omission of the words "wilfully and corruptly," that was necessary, because one of the depositions being true, both could not be wilfully and corruptly made. It is, however, charged,

(a) 8 Mod. 179.

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that

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that the defendant deliberately, knowingly, and of his own act and consent, did swear, &c. and that is sufficient. In the fourth and fifth counts it is not averred that the defendant's evidence related to material questions. The averment is not necessary; for it is quite sufficient if on the face of the indictment the questions appear to be material. And this averment is always omitted in the entries in *Tremayne*. Besides, the sixth and seventh counts do contain the averment; so that it is not important to discuss that question.

Adolphus and *D. F. Jones*, contrà. It may be admitted, that if the indictment had charged the perjury to have been committed before the House of Lords, the contradictory evidence previously given before the House of Commons might have been sufficient alone for the jury to have convicted the defendant of perjury. But then they would have found distinctly on which occasion the defendant had sworn falsely. This question is, however, very different. This is not a question upon the sufficiency of evidence, but upon the insufficiency of the shape and form of the accusation. The cases which have been mentioned are not authorities to govern the present; there the indictments appear to have contained counts framed in the ordinary way, as well as a count in this form, and there was a general verdict; and no such objection as the present could be available, if there was any one sufficient count. Besides none of those cases appear to have undergone much discussion at the bar, or any consideration in *Westminster Hall*. With respect to the present experiment it is in truth a charge, in the alternative, imputing, that either on the one occasion or the other, the defendant committed

committed perjury. Now, according to all the rules of criminal pleading, every indictment must contain a precise charge of a specific fact, alleged to be a crime committed on a particular day and at a particular place. Here no particular time or place is alleged, as to the crime intended to be insisted upon; two oaths are stated, of which it is said one must be false; it may be equally said that one must be true; but which was false and which true, the indictment does not state. Suppose an acquittal on such an indictment, and a defendant to be afterwards indicted in the ordinary form for perjury before the House of Lords, he could not plead *auterfoits acquit*, because it is not certain whether this indictment charges him with perjury there; he might then be indicted for perjury before the House of Commons, and he could not plead *auterfoits acquit*, for a similar reason; and so, for one offence, he might be tried three times. Suppose, again, that the two oaths are in different counties: in which is he to be tried? Suppose, also, a pardon of all offences up to a particular day. These are difficulties which shew, that, as this count is contrary to the principles of criminal pleading, so is it also contrary to justice. In *Com. Dig. Indictment*, G. 2., it is laid down, that it is bad if the day be uncertain, as if the offence be laid in *Festo St. Petri*, and there be two feasts of *St. Peter*. And in the same book and title, G. 3., many instances are given of indictments for murder and felony, which were held bad for their uncertainty, and for their being laid, as here, in the alternative. (a) The present form is also contrary to all the precedents of indictments in ordinary use; and the incongruity is here manifest, for the persons

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(a) See also 2 Hale's P. C. 178, 179.

And now, on this day, the judgment of the Court was delivered by

ABBOTT C. J. This case came before the Court on a motion in arrest of judgment, the defendant having been convicted on some of the counts of an information exhibited against him by the Attorney-General. One of these counts charges in substance, that a select committee of the House of Commons met to determine the merits of a petition, complaining of an undue election and return of two members of parliament for the borough of *Barnstaple*; that the defendant was sworn and examined as a witness before the committee at the parish of *St. Margaret, Westminster*, on the 1st of *March*, 59 G. 3., and then and there deliberately and knowingly, and of his own act and consent, deposed that he was a voter of the borough; that one *Wilkinson* took a part for Sir *M. L.*, one of the candidates, that the friends of Sir *M. L.* were entertained with eating and drinking at *Wilkinson's*; that he, the defendant, voted for Sir *M. L.*; that *Wilkinson* asked him for his vote, and told him he should have 5*l.*, with a proviso that he would give his word then to vote for Sir *M. L.*; that he did vote for Sir *M. L.*, and also for another of the candidates, Sir *Henry Thompson*; that he voted for Sir *M. L.* on account of the promise of 5*l.*, that he should not have voted for Sir *M. L.* without money, and that he should have given a plumper to Sir *H. Thompson*, if he had not had the money offered to him. The count then further charges, that at a session of parliament, a bill entitled "An act for preventing bribery and corruption in the election of members to serve in parliament," was pending before the House of Lords, reciting that bribery and

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wilful and corrupt perjury is drawn from the previous allegations, that he swore on each occasion knowingly and deliberately, and of his own act and consent, and from the manifest contradiction in the matters sworn. The question therefore is, whether perjury can be legally charged and assigned by shewing such contradictory depositions, with an averment that each of them was made knowingly and deliberately, but without averring or shewing in which of the two depositions the falsehood consisted. And we are of opinion that it cannot.

The first objection that occurs on the perusal of this information is the novelty of its form. One or two instances (*a*) of a similar form were mentioned at the

bar,

(*a*) The following precedent was read during the argument from Mr. Justice Chambre's Precedent Book.

Lancashire, to wit. The jurors for our lord the king, upon their oath, present that heretofore, to wit, on the 17th day of *January*, 1774, at *Manchester*, in the county aforesaid, one copper dish of the value of 2s., ten pewter plates of the value of 6s., &c. &c. of the goods and chattels of one *Robert Stevenson*, in the shop of the said *R. S.*, then and there being found, were feloniously stolen, taken, and carried away; and the jurors aforesaid, upon their oath aforesaid, further present, that afterwards, to wit, on the 25th *January* aforesaid, in the year aforesaid, *James Dane*, of *Manchester* aforesaid, cobler, came before *T. B. Bayley*, Esq., then and still being one of the justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the same county, and was then and there sworn, and took his corporal oath upon the holy gospels of God before the said *T. B. B.*, the justice aforesaid, he, the said *T. B. B.* then and there having sufficient power and authority to administer the said oath to the said *J. D.* in that behalf, and then and there, upon his oath aforesaid, before the said *T. B. B.*, *deliberately and knowingly*, did say, swear, and give information in writing, that on *Monday* night the 17th day of *January* then instant, he, the said *J. D.* saw *James Taylor* of _____, and *E. Hunt* of the same place, shoemaker, go into the shop of *R. S.* of *M.* aforesaid, brazier, in *Hanging-ditch of M.* aforesaid,

cision, and as instances of contradictory swearing have occurred at all times, and as this form of proceeding affords the greatest facility of proof to a prosecutor, the want

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further proof to falsify that testimony on which the indictment assigns the perjury. For it is said, that on which soever of his contradictory oaths the perjury be assigned, that oath must be taken to be true, unless disproved by two other witnesses. On the other hand, some have thought that if the indictment states the two contradictory oaths, and then concludes, that "so the defendant committed wilful and corrupt perjury," without any averment to falsify the facts sworn in either of the oaths, it is sufficient to warrant a conviction; perhaps an indictment in that form might be sufficient; but even upon the common indictment assigning the perjury upon one of the oaths only, and averring the falsity of the facts there sworn, (in the usual form,) it seems that the defendant may justly be convicted without any other proof of the perjury, than producing and proving the other deposition which the defendant had made in contradiction to that on which the perjury is assigned; for its being the defendant's own deposition, he cannot be admitted to say that deposition was false, for *nemo allegans turpitudinem suam est audiendus*, and if that be true, the other on which the perjury is assigned must of course be false. The reason why in other cases, the perjury must be proved by witnesses that outweigh the testimony of the defendant is, because, where there is only oath against oath, it stands in suspense on which side the truth lies. But when the same person has, by opposite oaths, asserted and denied the same fact, the one seems sufficient to disprove the other, and with respect to the defendant (who cannot contradict what he himself has sworn), is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichever of them is given in evidence to disprove the other, it can hardly be in the defendant's mouth to deny the truth of that evidence as it came from himself. Upon this principle *Yates J.* convicted a man at *Lancaster* Summer assises, 1764. He had first made his information on oath before a justice of the peace, that three women were concerned at a riot at his mill, (which was dismantled by a mob, on account of the price of corn;) and afterwards at the sessions, when the rioters were indicted, he was examined concerning those women, and (having been tampered with in their favour,) he then swore that they were not in the riot. There was no evidence on the trial of the defendant for this perjury to prove that the women were in the riot, (which was the perjury assigned,) but the defendant's own original information on oath being produced and read, whereby he had sworn they were in the riot,

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want of precedents of this kind cannot be accounted for by supposing that an indictment in this form had not been generally considered to be good.

The next and most material objection is, the impossibility of saying which a defendant may be exposed. For we are impossible to say consistently with any known law, that a person acquitted or convicted on an indictment in this form, could plead such acquittal or conviction as a bar to an indictment, charging perjury in the usual way on either of the depositions. The answer to such a plea would be, "you have never been tried for the charge now preferred against you," and such an answer would undoubtedly be true, in fact, and would be good in law. So that a defendant might be twice in peril of the punishment of perjury, and perhaps twice convicted and punished on the same subject; and an indictment like the present could be sustained.

It is not necessary to say whether an indictment, charging contradictory depositions, together with other charges and averments not found in the present indictment, would be good as an indictment for a manor. The difficulty of shewing on which occasions a party swore falsely, may perhaps enable a person to escape punishment, whose conduct like that of the present defendant may plainly appear to be of the highest degree reprehensible. But we think it better that such a person should escape than that an indictment

riot, the judge thought it sufficient to convict him. He was accordingly found guilty, and transported.

And afterwards Lord Mansfield C. J., and Wilmet, and Aston whom Yates J. stated the reasons of his judgment, concurred in the opinion.

should be held good, which is liable to the material objection of putting a person twice in peril of the pains of perjury on the same subject-matter, and we know of no election to adopt this or that mode that can be binding on the crown as was suggested in the argument at the bar in support of this information. The rule to arrest the judgment must therefore be made absolute, and the like rule in the other case of *The King v. Edwards*.

Rule absolute.

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a barge for *Pocock*, and the latter had paid the whole value in advance, and his name was actually painted on the stern of the vessel after the completion of the work; but before delivery, and before any commission of bankrupt had issued against the barge-builder, the barge was seized in execution for a debt of the bankrupt. It was held, that no property in the barge passed to *Pocock* until its completion and delivery, and consequently that the assignees were entitled to recover the value. Here, the bankrupt was only under a contract to deliver the ship, and although the stipulated time for building had actually elapsed, yet the vessel was not completed and launched until after the act of bankruptcy. The certificate under 26 G. 3. c. 60. s. 12. clearly is not to be given till the ship is completed, and until that time, therefore, no property passes to the vendee, *Groves v. Buck* (a), *Towers v. Osborne*. (b) But at all events, the case falls within the statute of *James*, for the ship was in the hands of the bankrupt as the reputed owner, *Hay v. Fairbairn* (c), *Robinson v. M'Donnell*. (d).

Holt, contra. There are two questions in this case; first, whether the property in the ship, rudder, and cordage, ever passed to the defendant; and, secondly, assuming that it did, whether it continued in the possession of the bankrupt at the time of the act of bankruptcy, as the reputed owner, with the consent of the true owner, within the statute of *James*. Here the property passed to the defendant under the contract, for there was a delivery to him before the 30th June. The

(a) 3 M. & S. 178.

(b) 1 Str. 506.

(c) 2 B. & A. 193.

(d) 2 B. & A. 134.

launched. The payments were to be made by bills at two, four, six, and eight months. The first and second instalments were duly paid. In *March*, 1819, the defendant appointed a master, who, from that time, superintended the building. In *May*, 1819, the defendant advertised the ship for charter, and on the 16th of *June* chartered her, with *Paton's* privity, for a voyage from *Newcastle* to *Newfoundland*. Before the 26th of *June* the ship was measured and surveyed, with *Paton's* privity, to the intent that the defendant might get her registered in his name. On the 19th *June* the master entered into the usual bond for delivering up the register; on the 25th *Paton* signed the usual certificate of her build, &c., and on the 26th the ship was registered in the defendant's name. On that day the defendant paid *Paton* the third instalment. *Paton's* certificate described the ship as launched, but that was not the case, and *Paton's* people continued working upon her, and using his timber and materials till the 3d of *July*. One of the master's apprentices was employed on board by his directions from the early part of *June*, and on the 30th the master ordered him to sleep on board; but on that same day *Paton* committed an act of bankruptcy, upon which a commission afterwards issued. On the 2d of *July* the defendant and a crew he had hired took possession of the ship, and his servants, by his direction, took from *Paton's* yard and warehouse a rudder and cordage, which *Paton* had bought for the ship. On the 4th of *July* the ship was launched. The fourth instalment was never paid. The ship was incomplete when the act of bankruptcy was committed, and the expence of launching her was borne by the defendant. Upon these facts, the questions proposed to the consideration of the Court were, whether the plaintiffs were entitled

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in the defendant. The defendant had, at that time, paid half what the ship, when complete, would be worth. *Paton* could not be injured by having the general property in the ship considered as vested in the defendant, because he would still have a lien upon the possession for the residue of the price; and we think the legal effect of signing the certificate for the purpose of having the ship registered was, from the time the registry was complete, to vest the general property in the defendant. In order to register the ship in the defendant's name, an oath would be requisite that the defendant was the owner, and when *Paton* concurred in what he knew was to lead to that oath, must he not be taken to have consented that the ownership should really be as that oath described it to be? The case of *Mucklow v. Mangles*, 1 *Taunt.* 318. seems to us to be clearly distinguishable from the present, because the bargain there for building the barge does not appear to have stipulated for the advances which were made, and those advances do not appear to have been regulated by the progress of the work. Mr. Justice *Heath*'s opinion appears to have been founded on the notion that the builder was not tied down to deliver that specific barge, but would have been at full liberty to have substituted any other he was building, and the builder had done no act expressing an unequivocal consent that the general property should be considered vested in the purchaser. The painting of the name upon the stern, the only act there, pledged the builder to nothing; it expressed an intention that the barge should be *Pocock*'s, but it did no more. He might change that intention and obliterate the name. But the signing of the certificate, here, to the intent that the defendant might obtain a registry in his own name, was a consent that what was

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necessary to enable the defendant to obtain suc-
try should, as between them, be considered :
plete, and that, as the defendant would have t
that he was sole owner of the ship, the ownership
be considered his. We are, therefore, of opini
the assignees, who claim under *Paton*, are bound
with him ; and, as this is not a case within the
of *James*, the plaintiffs are not entitled to rec
general value of the ship. And as to the ruds
cordage, as they were bought by *Paton* specific
this ship, though they were not actually attached
at the time his act of bankruptcy was committed
seem to us to stand upon the same footing with th
and that, if the defendant was entitled to take th
he was also entitled to take the rudder and cork
parts thereof. Upon the last question, however,
of opinion against the defendant. Though the
ownership was vested in the defendant, the po
remained with *Paton*; and as the bills for the th
fourth instalments were to be given at the launc
the ship (when launched), *Paton*, had he comple
ship, would have had a lien upon it till those bil
given ; and as the defendant thought fit to take th
before it was complete, after having given bills
first three instalments only, we think he ought
given a bill for so much of the fourth instalment
cording to the value of what remained to be
Paton was entitled to receive ; and that, unless w
mained to be done would be equal to the whole
fourth instalment, his taking the ship, without gi
tendering such a bill, was a wrongful taking. V
therefore, of opinion, that, according to the pr
made in that respect in the case, it ought to be r
to Mr. Bainbridge and Mr. Clayton, and such thi

son as they shall appoint, to take an account of the want of materials stipulated to be provided by *Paton* not on board, and the fair expence of launching, and to enter the verdict accordingly. If the want of materials, and the expence of launching, shall amount to 750*l.*, the verdict to be entered for the defendant; if it shall amount to less than 750*l.*, a verdict for the difference to be entered for the plaintiff.

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Judgment accordingly.

APOTHECARIES' Company against ROBY.

*Wednesday,
June 26th.*

THIS case was argued in the course of this term by *Scarlett, Gurney, and Campbell* for the plaintiffs, and by *Denman and Chitty* for the defendant. The facts of the case and the arguments addressed to the courts, are fully stated and observed upon by the Lord Chief Justice in delivering the judgment of the Court, and it is therefore unnecessary to state them here.

Cur. adv. vult.

By the 55 G. 3.
c. 194. s. 14.
it is enacted,
"that from and
after the 1st day
of August,
1815, it shall
not be lawful
for any person
(except persons
already in prac-
tice as such)
to practise as
an apothecary,
unless he take
out a certifi-
cate," &c. By
section 20, "if
any person
(except such as
are then actu-
ally practising
as such) shall,
after the said
1st day of
August, 1815,
act or practise
as an apothe-
cary without
having obtained
such certificate,
every person so
offending shall
forfeit 20*l.*;"
Held, in an

ABBOTT C. J. now delivered the judgment of the Court. This was an action for a penalty on the statute 55 G. 3. c. 194., for practising as an apothecary without having obtained the certificate required by that act, which received the royal assent on the 12th *July*, 1815. At the trial before me, some evidence was offered on the part of the defendant, to shew that he had been practising as an apothecary in town, in *June*, and some part of *July*, 1815, including the 12th of *July* in that

action for the penalty, that it was not sufficient for the defendant, in order to bring himself within the exception, to shew that previously to and on the 12th of *July*, 1815, (when the act received the royal assent,) he was practising as an apothecary, but that it was necessary to shew that he was so practising on the 1st of *August*, 1815.

1822. year; but as the evidence, such as it was, did not to the first day of *August*, the defendant having that day left town, and become an assistant apothecary at *Chatham*; and, as I was of opinion no person was exempt from this penalty, who was in practice as an apothecary, on the 1st of *August* jury under my direction in that respect, found verdict for the plaintiffs. A rule to shew cause there should not be a new trial was obtained, and shewing cause it was contended by the plaintiff, that the direction was right in point of law; and so, then secondly, that there was no evidence that the defendant had at any time practised as an apothecary within the meaning of this statute. It is not necessary to give any opinion upon the latter point, because all of opinion that the direction was right in point of law. The statute was passed as I have before served, on the 12th of July, 1815, but it may be generally to take its effect from the first of *August* following.

The great object of the statute, as appears by preamble to the 7th section, was to prevent dangers to the health and lives of the king's subjects by ignorant and incompetent practitioners. For this purpose provisions were made regarding two classes of persons, persons practising as apothecaries, and persons assisting as assistants to apothecaries. It would be known by the legislature, that some persons would be found engaged in each of those branches at the time (what that should be) at which the penalties imposed by act might be made to take effect, and it was reasonable that some at least of such persons should be exempted from its enactment; and we are to learn from the language of the statute, what is the precise time at which

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against
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person must have been so engaged in order to be thus exempted.

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Company
against
Ross.

There are five sections in which the time is mentioned, viz. the 14th, 17th, 20th, 21st, and 29th. The 14th regards apothecaries, and is a prohibitory clause, and it runs thus, "from and after the first of *August*, it shall not be lawful for any person or persons (except persons *already* in practice as such,) to practice as an apothecary, unless," &c. Now the word "*already*" as here used is of doubtful import, it may either relate to the first of *August* or to the passing of the act. The 17th section relates to assistants, and is the prohibitory clause as to them: and it is thus, "from and after the first of *August*, it shall not be lawful for any person or persons, (except the persons *then* acting as assistants,) and except those who have served an apprenticeship, to act as an assistant." In this clause there is no ambiguity, the word "*then*," plainly and obviously refers to the first of *August*.

The 20th section is the penal clause; it embraces both the classes, viz. apothecaries and assistants, with a difference however as to the amount of the penalty; and it is thus, "if any person (except such as are *then* actually practising as such,) shall after the first of *August*, act or practise as an apothecary without, &c. he shall forfeit 20*l*. And if any person, except such as are *then* acting as such, and except those who have served an apprenticeship, shall after the first day of *August* act as an assistant, he shall forfeit 5*l*."

In this clause also taken by itself, there is no ambiguity, the word *then* plainly refers to the first of *August*. And this seems to indicate, that the word *already*, as used in the 14th section, is there used to

the royal college of surgeons, or the said society of apothecaries, except such as have been altered, varied or amended by the act, or of any person or persons practising as an apothecary previously to the first of *August*; but the said universities, colleges, and persons, shall have, &c. all such rights, &c. save and except as aforesaid, in as beneficial a manner as they might have done if the act had not been passed.

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Company
~~against~~
Rox.

Now, if the words previously to the first of *August* are to be taken in their large and unqualified sense, this saving clause will be quite irreconcileable with the 14th section, whether the word "*already*" there used be referred to the day of the passing of the act, or to the first of *August*, and also with the 20th section, which plainly mentions the first of *August*; and the inquiry in any proceeding on the statute may always be, not whether the party was in practice on the 12th *July* or on the first of *August*, but whether he had been in practice at any remote period of his life. It is impossible to suppose that this was intended, and it seems to us, that the only mode of reconciling all the clauses and carrying the plain object of the law into effect, is to consider those apothecaries only to be exempt from its provisions who were in practice on the day on which the act took effect, that is, the first of *August*. This construction is not inconsistent with the words of this clause, for the clause contains only a saving of the rights of those persons who were in practice before the first of *August*, except as altered or varied by the act, and that alteration is to be found in the 20th section, which imposes the penalties on persons not in practice *on* the first of *August*. It is not necessary, as I have before observed, to say in this case, whether a person claiming the exemption

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—
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 Company
 against
 Ross.

emption must have been in practice both before the first of August. If the meaning of this clause be doubtful, then, according to all sound construction, the plain sense of the penal clause must prevail. Attending to all the parts of this saving, it appears to have been introduced *ex majori* and not intended to control any previous enactments; we think the language of it too doubtful to have it controlling the plain words of the penal clause; we are consequently of opinion, that the direction given in the trial was right, and that the rule for a new trial be discharged.

Rule discharged.

Wednesday,
 June 26th.

GILPIN against ENDERBEY, (in Error.)

By deed *A.* and *B.* covenanted to become partners in the business of army clothiers for ten years; and that *A.* should advance 20,000*l.* as part of the capital for carrying on the business, and that *B.* should find a like sum; that

A., during the continuance of the partnership, should have out of the profits, if any, or if not, out of the capital, 2000*l.* yearly for his share of the profits. *B.* then covenanted that on the determination of the partnership by effluxion of time, the sum of 20,000*l.* should be repaid to *A.*; that *B.* should guarantee all debts and pay all losses. An action brought upon this deed to recover the 20,000*l.* at the expiration of the term, the defendant pleaded that the deed was executed, by way of shift, in pursuance of an usurious agreement. That plea, upon issues joined, was negatived by the verdict of the jury, and judgment was given by the Court of C. B. for the plaintiff: Held, upon appeal in K. B., that after that finding, the deed must be taken to disclose the real intention of the parties, and that it was not in that case void upon the ground of usury.

trust and confidence which the said plaintiff and defendant reposed in each other; and in consideration of the covenants and agreements in the said indenture after contained to be entered into by them mutually and reciprocally with each other, each of them, the plaintiff and the defendant, did by that indenture covenant with the other of them in manner following: viz. that they, the plaintiff and defendant, should become partners in the business of an army clothier for the term of ten years; and that defendant should advance 20,000*l.* as part of the capital for carrying on the business; and that defendant having accordingly advanced the sum of 20,000*l.* immediately before the execution of the indenture, the residue of the capital should be provided by plaintiff, *Gilpin*, or by him and such additional partner as in the said indenture mentioned, and should be equal to at least 20,000*l.*; and further, that during the continuance of the partnership, *Enderbey* should be entitled to have out of the profits of the said trade, (and in case of any deficiency therein, then out of the capital thereof) by half yearly portions a certain sum of money therein mentioned, viz. 2000*l.* per annum, as for his full dividend or share of the profits or produce of said trade; and that all the residue of the profits of the trade in each half year during the partnership, should, on the days in that behalf mentioned, and also on the determination of the partnership, belong to, and be the sole property of, and be had, received, and taken by *Gilpin*, as and for his share of the profits of the said partnership. And the said plaintiff, *Gilpin*, by the indenture further covenanted with the defendant, that on the determination of the partnership by effluxion of time, the said sum of 20,000*l.* should be repaid to the defendant, *Enderbey*,

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all debts which should be due to the partnership; that neither of the parties should become surety during the continuance of the partnership, or compound or release debts, &c. &c.; that in case *Gilpin* should depart this life at any time before the expiration of ten years, and his executors should refuse to carry on the partnership, they should have power to determine it on giving three months' notice to *Enderbey*, and on paying out of the partnership money and effects, the sum of 20,000*l.* advanced to the capital of the partnership; and such further sum as should be a proportional part of the sum of 2000*l.* for *Enderbey's* share of the profits; that on the determination of the partnership by effluxion of time, in case it should so determine, a sufficient part of all the debts due or owing to the partnership, should be fully repaid to *Enderbey* by six equal instalments, to be computed from the determination of the partnership; that in case at any time during the partnership, the value of the partnership effects should be reduced to the sum of 20,000*l.*, or in case either of the parties should become bankrupt, or depart the realm, or do several other acts therein named, it should be lawful to determine the partnership by notice; and that in case *Gilpin* should refuse to keep the accounts, or to render a statement, or deny the perusal of the books to *Enderbey*, that *E.* might upon one month's notice dissolve and determine the partnership, and that the sum of 20,000*l.* should be payable forthwith from the expiration of the notice. Covenant to refer differences to arbitration and other usual covenants. The defendant then pleaded, that before the making of the indenture, to wit, on, &c. at, &c. it was corruptly and against the form of the statute agreed between the plaintiff and defendant, that

the

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EARL BENTLEY.

the plaintiff should lend and advance to the defendant the sum of 20,000*l.*, and that the plaintiff should bear and give day of payment thereof to the defendant for the space of ten years thence next ensuing, and that the defendant, for the loan of the said 20,000*l.*, and for the forbearing and giving day of payment thereof, should yearly, during the said term of ten years, pay to the plaintiff the sum of 2000*l.*, by half yearly portions, on the 24th *March* and 24 *October* in each year; and that, for securing the payment of the sum of 20,000*l.* with such payment yearly to the plaintiff, the plaintiff and defendant by way of shift, should execute a certain instrument in form of a deed of partnership, according to the true and effect of the indenture in the declaration mentioned. And that, in pursuance of said corrupt and unlawful agreement so made, the plaintiff afterwards, to wit, on, &c. at, &c. aforesaid, lent and advanced to the defendant the said sum of 20,000*l.* on the terms aforesaid, that for securing the payment thereof, with such payments half yearly as aforesaid; the plaintiff and defendant by way of shift afterwards, to wit, on, &c. executed the indenture in the declaration mentioned, and the plaintiff then and there accepted of and acknowledged the said part of the supposed indenture so by him produced in Court as aforesaid, in pursuance of said corrupt and unlawful agreement, and for the purposes aforesaid. And the defendant avers, that the sum of 2000*l.* so to be paid yearly for the loan of the said 20,000*l.* exceeds the rate of 5*l.* per cent. according to the form of statute. Whereby the said indenture was and is wholly void in law; and this, &c. In conclusion, that the plaintiff and the defendant, execu-

the indenture in the declaration mentioned for good and lawful considerations, and not by way of shift or in pursuance of, or upon the said corrupt and unlawful agreement, or for the purpose in the said plea of defendant mentioned, in manner and form as defendant hath in his plea alleged. And this the plaintiff prays may be enquired of by the country, &c. And the defendant doth the like. The jury found a verdict upon the issues joined on the plea in favour of the plaintiff below, thereby negativing the corrupt agreement. And the Court of Common Pleas gave judgment for the plaintiff below. The record having been removed into this Court upon a writ of error. The case was argued on a former day in this term, by

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Campbell, for the plaintiff in error. This deed is usurious on the face of it, and, although the issues on the pleas were found in favour of the plaintiff below, yet the case is now to be considered as if the deed had been merely set out upon oyer, and the defendant below had demurred. This case is distinguishable from *Dandev v. Currer* (a), for there the usury did not appear on the face of the declaration. Here, the principal was never in hazard; for if the entire capital had been lost in the course of carrying on the trade, *Enderbey* might still have maintained an action to recover his principal at the end of ten years. If, therefore, at the commencement of the partnership, *Gilpin* was possessed of property to the amount of 100,000*l.*, and the losses of the trade exceeded the 40,000*l.*, which was the entire capital embarked in it, still *Gilpin* would be liable to make good,

(a) *Siderfin*, 285.

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out of his entire fortune, the 20,000*l.* at the end of ten years; for there is an express stipulation that losses shall be borne by *Gilpin*. This, therefore, is no mere loan to *Gilpin* of 20,000*l.*, for which he was to receive more than 5*l.* per cent. interest. If there be an absolute covenant to repay the 20,000*l.*, the stipulated interest, the deed is usurious. If on the other hand, the covenant be conditional, to pay the 20,000*l.* if the profits and capital remain at the end of ten years are sufficient for that purpose, then the declaration is defective, because it does not contain any averment that the profits and capital were sufficient. In *Morse v. Wilson* (*b*) it was expressly decided, that if the borrower of money gave a bond for the principal and interest at 5*l.* per cent. and covenant at the same time also to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with another person, that is an usurious contract, and the obligee cannot recover on the bond.

Parke, contra. In order to constitute usury, there must be a loan of money. Here there was no loan of money to *Gilpin*. The deed does not even state that the money was advanced to him, but merely that the parties had agreed to become partners for ten years, and that *Enderbey* should advance 20,000*l.* as part of the capital for carrying on the business. *Gilpin* did not acquire the whole interest in the sum so advanced, *Enderbey* had a joint interest in it with *Gilpin*. Be-

the jury have found as a fact that this was a bona fide partnership. *Hammett v. Yea* (*a*), *Masterman v. Cowrie* (*b*), *Barclay v. Walmsley* (*c*), *Doe d. Metcalf v. Brown* (*d*), *Yeoman v. Barstow* (*e*), are authorities to shew that there must be an actual loan of money to constitute usury, and that there may be cases where more than 5*l.* per cent. is taken for the use of money, and where the principal is not even put in hazard, where the offence of usury is not committed. The case of *Morse v. Wilson* is distinguishable, because there, there was an actual loan of money. Here there was no loan, but an advance of money for the purpose of carrying on the trade.

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Campbell in reply. In the cases cited, no money passed from one party to the other. In *Yeoman v. Barstow* the contract did not appear upon the face of the declaration to be usurious; for it was a contract for old hammered silver, which cannot be considered money. Besides, the authority of that case is much shaken by what fell from Lord Alvanley in *Marsh v. Martindale* (*f*), and Mr. Comyn in his *Treatise on Usury*, p. 101., states that case to be at variance with all the other decisions.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This case was argued before us a few days ago. It is a writ of error, brought on a judgment of the

(*a*) 1 Bos. & Pul. 153.

(*b*) 5 Campb. 488.

(*c*) 4 East, 55.

(*d*) Holt's N. P. Rep. 295.

(*e*) Lutw. 273.

(*f*) 3 Bos. & Pul. 154.

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against
.ENDERBEY.

Court of Common Pleas, in an action of cove
an indenture, bearing date the 24th of *Septembe*
To this action *Gilpin*, the defendant below,
several pleas of the statute of usury, upon whic
were joined, and found against him, and judgme
for *Enderbey*, the plaintiff below. The indentu
forth at large upon the record, and the ground
writ of error was, that this indenture manife
hibits a case of usury within the statute, and
consequently, to be pronounced void in law. Ti
ticulars of the deed were so recently *adverted to*
argument that a very concise notice of them w
sufficient. The indenture professes to be a d
partnership between these parties for ten years.
counsel on both sides agreed that, by the effect
deed, *Gilpin* covenants absolutely that *Enderbey*
at the expiration of the ten years, receive the 2
therein said to have been advanced by *Enderbey*
rying on the trade, whether the stock and capital
partnership may at that time be sufficient or insu
for that purpose. The Court adopts this consti
thus agreed upon for the purpose of its present
ment. Indeed the plaintiff below cannot mainta
action upon any other supposition, because he h
averred a sufficiency of stock or capital to answ
whole or any part of the 20,000*l.* claimed, and t
fendant below builds his argument of usury mai
this foundation. According to the contents o
deed, *Gilpin* was carrying on the business of an
clothier, &c. The parties agree to become parti
that business for ten years. *Enderbey* advances 20
as part of the capital for carrying on the busines
Gilpin covenants that the residue of the capital sh
pr

provided by him to the amount of at least 20,000*l.* *Gilpin* is to conduct the trade in his own name, and *Enderbey* is not to be required to interfere. *Enderbey*, during the continuance of the partnership, is to take out of the profits, or, if they be insufficient, then out of the capital 2000*l.* per annum, as and for his share of the profits. *Gilpin* is to pay into the partnership stock all such losses as may arise in carrying on the trade, and to guarantee the payment of all debts that may be owing to the partnership; and at the end of the ten years, if he be then living, *Enderbey* is to have back his 20,000*l.* as before mentioned. If the partnership effects, stock, debts, and credits, be at any time reduced to 20,000*l.* the partnership may be dissolved.

There are clauses for keeping and exhibiting regular accounts, for referring disputes to arbitration, and several others usual in partnership deeds.

By the execution of this deed, *Enderbey* undoubtedly made himself answerable as a partner to all strangers, though he might not be answerable as between himself and *Gilpin*. And if the deed discloses the real facts, and the intention of the parties to it, this is not the case of a loan of money by *Enderbey* to *Gilpin*, but a contract of partnership between them of a peculiar kind. If the deed does not disclose the real facts and the intention of the parties, but was executed only as a contrivance to cover a loan of 20,000*l.* for ten years, at 10*l.* per cent., the deed was undoubtedly void; but this is a fact that ought to have been found affirmatively by a jury, to enable the Court thereupon to declare the deed void. No such fact has been found, and, in the absence of such a finding, we must consider the deed as speaking the language of truth. And, so considering it, we

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cannot pronounce it to be void. The parties constituted by this deed, may be, and probably unusual kind : but that circumstance will not us to say that there was in truth no partnership there was a partnership, there is no loan of n *Enderbey to Gilpin*, and no usury. Unusual partnership may be, it is by no means impossible man carrying on trade with a capital of 20,000 have made a profit of 3000*l.* a-year, and mig think and expect, (though I cannot say that, in nion, such an expectation was likely to be realize if the capital were doubled, the clear profits w doubled also, and might, on such an expectat gage that any person who would bring 20,000*l.* receive 2000*l.* per annum, which would leave 4*l* himself; and so be, in his estimation, a very good Some such opinion may have produced the cont between these parties. We must take their contr the deed, and so taking it, we cannot pronounce usurious. The judgment, therefore, must be af

Judgment :

PHILIPS *against* SHAW.

IN this case, Vol. IV. p. 435., it ought to ha stated that there were two counts in the decl in the latter of which the pro ut patet per re was omitted ; and that the verdict was taken u latter count only.

END OF TRINITY TERM.

AN

I N D E X

TO THE

PRINCIPAL MATTERS.

ACTION ON THE CASE.

1. An action at common law will not lie for disturbing another in the possession of a pew, unless the pew be annexed to a house in the parish. *Mainwaring v. Giles, H.* 2 and 9 G. 4. Page 356
2. An action lies for the malicious prosecution of a bad indictment for perjury. *Pippett v. Hearn, E.* 3 G. 4. 634

ACCEPTANCE.

See FRAUDS, STATUTE OF, 2. 5.

ADMINISTRATOR.

In an action by an administrator upon a bill of exchange, payable to the intestate, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing.

An agent, having money in his hands belonging to his principal, purchases with it a bill of exchange,

which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character: Held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator from the time of demand of payment made by the administrator, &c. not from the time the bills became due.

Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendants' liability, &c.; and the defendants pleaded that the cause of action did not accrue within six years, to which the plaintiff replied generally, that it did accrue within six years: It was held that the replication was good. *Murray, Administrator, v. The East India Company, M.* 2 G. 4. Page 204

ADVOWSON.

A bond was conditioned for the resignation of a living, which the defendant, when requested, had refused to resign: Held, that he being a wrong doer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest; nor in estimating the annual proceeds, to deduct the curate's stipend. *Lord Sondes v. Fletcher, T. 3 G. 4.*

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AMENDMENT.

See PRACTICE, 41.

ANNUITY.

1. By a public act the Waterloo Bridge Company were authorised to raise money for the purpose of completing their undertaking, either among themselves or by the admission of new members, or by granting annuities for a term of years or for life. The act did not contain any provision that the annuities should or should not be redeemable. The Company, however, in the original grant, reserved to themselves a power of redemption: Held, under these circumstances, that an auctioneer, putting up to sale one of these annuities, was bound in his particulars of sale to describe it as a redeemable annuity. *Coverley v. Burrell, M. 2 G. 4.* 257

2. By the 53 G. 3. c. 141. the memorial of an annuity must contain the description and place of residence of the witnesses to the annuity deed.

A mere surety who charges with the payment of an annuity his estate in fee simple, of which he was seized in possession at the time of granting the annuity, and which

was of greater annual value than the annuity, is a grantor within the meaning of the 13 s. 8., and therefore in such case no memorial is required. *v. Lincoln and Another, 3 G. 4.*

3. Under the 53 G. 3. c. 1 is requisite that the names of the persons to whom an annuity should be given, and places of abode, and names and places of abode of witnesses to a warrant or indenture, where it was the intention of the testator that this was not sufficient, appearing that A. B. did not appear at the time of the execution of the will, but only attended at the funeral service at the time. *Spurdon v. Richard, E. 3 G. 4.*

*But see statute 8 Geo. 4. 4. The condition of a bond is that the obligor had cohabited with a woman for seven years, and had by her two children, a son and a daughter, named, and that she being desirous to put an end to the marriage, had applied to the court to make a provision for her children, which he had refused to do; and for that purpose the obligor entered into the question, which was conditioned that the annuity was to be paid to the mother yearly during the joint natural lives of the mother and two children, a son and a daughter, mentioned in the will, and that the same was to be applied to the maintenance and education of the children as of herself; or in case of the death of the two children, specifically named, then the annuity was to be paid to the mother during her life. One of the children died during the life of the mother: Held, that the annuity was payable to the mother, at all events. *J. Wife v. Tallent, T. 8 G. 4.**

APOTHECARIES.

By the 55 G. 3. c. 194. s. 14. it is enacted, "that from and after the 1st day of *August*, 1815, it shall not be lawful for any person (except persons already in practice as such) to practise as an apothecary, unless he take out a certificate, &c. By sect. 20. "if any person (except such as are then actually practising as such) shall, after the said 1st day of *August*, 1815, act or practise as an apothecary without having obtained such certificate, every person so offending shall forfeit 20*l.* : Held, in an action for the penalty, that it was not sufficient for the defendant, in order to bring himself within the exception, to shew that previously to and on the 12th of *July*, 1815, (when the act received the royal assent, he was practising as an apothecary,) but that it was necessary to shew that he was so practising on the 1st of *August*, 1815. *The Apothecaries' Company v. Roby*, T. 3 G. 4. Page 949

APPEAL.

1. An order of removal was dated the 1st of *August*, 1814, and an order of suspension indorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and indorsement was, in 1814, served upon the appellants, but the original order not produced at the time of serving such copy; and subsequently, in 1815, another part of the order and indorsement, executed by the same justices, but bearing date in *August*, 1814, was served upon the appellants. The pauper was not removed till 1819, when an appeal was duly entered: Held, that the services of the original order of removal in 1814 and 1815 were both defective, and that the ap-

peal was made in time, notwithstanding 49 G. 3. c. 124. s. 2. *Rex v. Inhabitants of Alnwick*, M. 2 G. 4. Page 184

2. By a clause in an inclosure act; a commissioner was authorised to stop up any way, provided it be done by the order, and with the concurrence of two justices, and that order was to be subject to an appeal in like manner, and under such form and restrictions as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved was to be at liberty to appeal at any time within six months after the cause of complaint. Under this act the commissioners, with the concurrence and order of two justices, stopped up a road, without giving the public notices required by the 55 G. 3. c. 68.: Held, that a party aggrieved might, under these circumstances, appeal at any time within six months. Quere, whether it be necessary to give such notices where roads are stopped up under the provisions of an inclosure act. *Rex v. Townsend*, H. 2 and 3 G. 4. 420

3. Where an order of removal has been executed, and by consent of the removing parish and the magistrates making it, it is superseded, and the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that justice requires it, in order to compel the respondents to pay the costs of maintenance, &c. incurred by the appellants before the order was superseded. *Rex v. The Justices of Norfolk*, H. 2 and 3 G. 4. 484

4. The 18 G. 3. c. 19. s. 5. gives an appeal only in case the majority of overseers concur in it. *Rex v. Justices of Lancashire*, E. 3 G. 4.

755

c. 46. s. 3., if the plaintiff arrests and holds the defendant to bail for the amount due to him, without at the same time giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance. *Dronefield v. Archer, H.* 2 and 3 G. 4. Page 513

2. Where a defendant being previously in custody in execution for a debt, a detainer was lodged against him, but for too large a sum, and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer. Held, that this second detainer was regular, and that it was not like the case of a fresh arrest which cannot be made till the costs have been paid. *White v. Gompertz, T. T.* 3 G. 4. 905

ASSIGNMENT.

1. Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c. and then averred that plaintiff did assign the bill. It appeared, that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant, the bill and all sums of money due thereon, to and for the defendant's own use, and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: Held, that the declaration imported, that the plaintiff had made an absolute assignment of the bill; and consequently, that the assign-

ment in evidence being only conditional, this was a fatal variance. *Vansandau v. Burt, M.* 2 G. 4.

Page 42

2. Where there were two assignments of the same lease of premises within the county of *Middlesex*, and that executed last was registered first: Held, that the deed last registered must, in a court of law, be considered as fraudulent and void, in consequence of *7 Ann. c. 20. s. 1.*, although the party claiming under the second assignment had full knowledge, when it was executed, of the prior execution of the first assignment. *Doe dem. Robinson v. Alsop, M.* 2 G. 4. 142
3. Where an assignment of a lease by deed, taken in execution, was made in the name and under the seal of office of the sheriff, by *A. B.*, acting as under-sheriff: Held, that such assignment was sufficiently proved, without proving further the appointment of *A. B.* as under-sheriff, and that he had power by deed to execute deeds in the name of the sheriff. *Doe dem. James v. Brown, M.* 2 G. 4. 248

ASSUMPSIT.

See CARRIERS, 1, 2.

1. The giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and therefore, where a ship having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the

- the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages: Held, that there being contradictory decisions as to the point whether the ship-owners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. *Longridge and Another v. Derville and Another*, M. 2 G. 4. Page 117
2. Assumpsit will lie upon a bill of exchange against a trading corporation whose power of drawing and accepting bills is recognized by statute. *Murray v. The East India Company*, M. 2 G. 4. 204
3. A printer cannot recover for labour or materials used in printing any work, unless he affixes his name to it, pursuant to the 39 G. 3. c. 79. s. 27. *Bensley v. Bignold*, H. 2 and 3 G. 4. 335

ATTACHMENT.

See PRACTICE, 20.

ATTORNEY.

See PRACTICE, 9. 42.

1. Where an attorney, in order to get possession of papers belonging to *A. B.*, in the hands of *A. B.*'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that *A. B.* should enter into an unqualified reference, not revocable, &c.: Held, that *A. B.* having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not

ATTORNEY.

- an election by the former a under 49 G. 3. c. 121. s. 14 to dispense with the ref and that the attorney was pursuant to his undertake procure *A. B.*'s signature agreement of reference, & find security for the perso of the award to the satisfac the Master. *Ex parte F* H. 2 and 3 G. 4. Pa
 2. A clerk to an attorney held, the term for which he was in the office of surveyor of taxes the crown: Held, that he not, within 22 G. 2. c. 46. s. 10., be considered as servis whole time and term in the p business of an attorney; and he ought not to be admitted to the roll; and that having been admitted, he ought to be struck *Ex parte Taylor, Gent.* one H. 2 and 3 G. 4.
 3. An attorney brought his bill for his bill of costs, and the defendant to bail for a large sum than was afterwards found due upon taxation, without any reasonable or probable cause for so doing: Held, that this was a case within the 43 G. 3. s. 3.; and that if not within statute, still the Court, in the exercise of its jurisdiction over officers, would compel an attorney to pay costs under such circumstances. *Robinson v. Elsa* 3 G. 4.
 4. Where a bailiff had written attorney for writs, which he sent without knowing any thing of the parties or circumstance, the bailiff never represented himself, or had been considered attorney, nor looked for any aid upon the law proceedings: that this was not a case within 22 G. 2. c. 46. s. 11.; but it was a most improper practice which the Court, in virtue of

general jurisdiction over attorneys, would punish severely. *Ex parte Wharton, T. 3 G. 4.* Page 824

AUCTIONEER.

See ANNUITY, 1. FRAUDS, STATUTE OF, 1.

AWARD.

See ARBITRAMENT, 2. 3. TITHE, 2.

BAIL.

See PRACTICE, 6. 9. 17, 18.

BANKERS.

See PLEADING, 28.

BANKRUPT.

1. *A., B., and C., entered into a bond to the king, the condition of which was, that A., as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage-coaches. A., as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. A. sci. fa. having afterwards issued upon the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that A. was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 8. c. 121. s. 8., and consequently that the latter was pro-*

tected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded. *Westcott v. Hodges, M. 2 G. 4.*

Page 12

2. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to J. S., sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between J. S. and the assignees, J. S. allowed credit to them for the price of goods, and he then preyed the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees, afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner. *Hudson v. Granger, M. 2 G. 4.* 27

3. *A., a foreign merchant, purchased in his own name, but on account and with the money of B., a British merchant, certain bank shares in the French funds. The latter drew bills upon A., which he accepted, on the security of those shares standing in his name; and these bills were assigned by B., for a valuable consideration, to C., a British subject. Before they became due, B. authorised A. by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; B., also, afterwards became bankrupt. C., by process in the foreign country, attached the bank shares still standing in the name of A. for the debts due to him upon the bills; and the Court there decreed that*

- owner, within the 21 Jac. 1. c. 19. *Knowles v. Horsfall and Others, M. 2 G. 4.* Page 134
7. Where a bond was given under 4 G. 3. c. 93. s. 1. by a member of parliament, being a trader, and, after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that the bankruptcy and certificate were no discharge to the bond. *Jameson and Another v. Campbell, M. 2 G. 4.* 250
8. A testator devised a copyhold estate to his wife for life, remainder to his son, and the heirs of his body, and there was no custom in the manor to entail copyholds; the son survived his mother, and had issue, and having become bankrupt, he died before admittance, and before any bargain and sale was executed by the commissioners of this estate: Held, that he took a fee-simple, conditional at common law, and that the commissioners might execute a valid conveyance of the estate after his death, pursuant to 1 Jac. c. 15. s. 17. *Doe dem. Spencer v. Clark, H. 2 and 3 G. 4.* 458
9. Where an attorney, in order to get possession of papers belonging to *A. B.*, in the hands of *A. B.*'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that *A. B.* should enter into an unqualified reference, not revocable, &c.: Held, that *A. B.* having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 G. 3. c. 121. s. 14. so as to dispense with the reference, and that the attorney was liable, pursuant to his undertaking, to procure *A. B.*'s signature to an agreement of reference,
- and to find security for the performance of the award to the satisfaction of the Master. *Ex parte Hughes, H. 2 and 3 G. 4.* Page 482
10. A smuggler may be a trader within 1 Jac. 1. c. 15. s. 2. as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. A penalty due to the crown is a debt within 21 Jac. 1. c. 19. s. 2.; and, therefore, where a trader lay in prison, above two months, being unable to pay exchequer penalties for smuggling: Held, that it was an act of bankruptcy. *Cobb, Assignee of Monsey, v. Symonds, H. 2 and 3 G. 4.* 516
11. The commissioners of bankrupt are authorised by the 49 G. 3. c. 121. s. 13. to bring up a bankrupt, charged in execution, for the purpose of a full disclosure of his estate and effects, at any of the three meetings under the commission, or any adjournment thereof. *Spence and Another v. Jones, E. 3 G. 4.* 705
12. A bankrupt in the interval between the second and third meetings under his commission, gave a promissory note as a security for a pre-existing debt to a creditor, who was acting as one of the commissioners at the time, and afterwards signed the bankrupt's certificate. The debt for which the security was given was not proved under the commission: Held, that such security was invalid, and that no action could be maintained upon it. *Haywood Gent. one, &c. v. Chambers, E. 3 G. 4.* 753
13. Where a surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of a bankrupt, who had proved under the commission, and thereupon satisfaction was entered on

on the record: Held, that this did not fall within the 49 G. 3. c. 121. s. 8., as being a payment of part of a debt in discharge of the whole, and that consequently the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him. *Soutten v. Soutten*, T. 3 G. 4. Page 852

14. Where *J. S.*, being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants through whom the shipment was to be made, that the goods were the property of *A.*, and shipped on his account; and *A.* accordingly, by the desire of *J. S.*, wrote to those merchants, stating the party to be so, and directing them to insure, and to advance money to *J. S.* on the goods, which was done: Held, that this was a credit given to *A.* by *J. S.*, by the delivery of goods, in its nature likely to terminate in a debt; and that, therefore, *J. S.* having subsequently become bankrupt, *A.* was entitled to recover the proceeds of the shipment from the merchants, and to set off against them a debt due from the bankrupt to him, it being a case of mutual credit within 5 G. 2. c. 30. s. 28. *Easum and Others, Assignees of Dowsland, a Bankrupt, v. Cato*, T. 3 G. 4. 861

BASTARD.

See SETTLEMENT, 4.

BATHING, RIGHT OF.

The public have no common-law right of bathing in the sea; and, as incident thereto, of crossing the sea shore on foot, or with bathing machines, for that purpose. *Blundell v. Catterall*, M. 2 G. 4. 268

BILLS OF EXCHANGE.

BILLS OF EXCHANGE

See SET-OFF.

1. *A.*, a foreign merchant, purchased in his own name, but on account and with the money of *B.*, a British merchant, certain bank shares in the French funds. The *B.* drew bills upon *A.*, which he accepted, on the security of the shares standing in his name, these bills were assigned by *B.* a valuable consideration to a British subject. Before they came due, *B.* authorised *A.* letter to sell the bank shares, order to reimburse himself against the bills. Before that letter arrived, *A.* had stopped payment and afterwards became bankrupt and the bills were dishonoured. *B.* also afterwards became bankrupt. *C.*, by process in the foreign country, attached the bank shares still standing in the name of *A.*, the debts due to him upon the bills and the court there decreed that the bank shares should be sold, that the proceeds should be applied, first, to pay a debt due from *B.* to *A.*, and afterwards to release the bills. Under this decree received a certain sum of money on account of the bills: Held, that the assignees of *A.* could recover back this money as money belonging to *B.* *Carencoe v. Another, Assignees of Power v. Fost and Others*, M. 2 G. 4. Page 2.
2. The condition of a bond, after reciting that defendant and *J. S.* had delivered and indorsed to plaintiff a bill of exchange drawn by *J. S.*, and accepted by *A.*, was, that defendant and *J. S.*, either of them, their heirs, should pay or cause to be paid the plaintiff, his executors, &c. the sum secured by the bill, within a month after it should become due and payable, in case it should

be then paid by the acceptor to the plaintiff, his executors, &c., according to the tenor of the said bill, together with interest from the time the bill became due: Held, that, to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and J. S., or either of them. *Murray v. King, M. 2 G. 4.*

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3. Assumpsit will lie upon a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognised by statute. *Murray, Administrator, v. The East India Company, M. 2 G. 4.* 204

4. A bill of exchange was accepted, payable at Messrs. P. and H., bankers, London, but was not presented there for payment when due, nor until some days after: the acceptor is still liable, no inconvenience having resulted to him from the delay to present the bill. *Rhodes v. Gent, M. 2 G. 4.* 244

5. When a defendant, having once written his acceptance with the intention of accepting a bill, afterwards changes his mind, and before it is communicated to the holder, or the bill delivered back to him, obliterates his acceptance: Held, that he is not bound as acceptor. *Cox and Others v. Troy, H. 2 and 3 G. 4.* 474

6. Three persons joined as drawer, acceptor, and first indorser, in making an accommodation bill; and it was afterwards issued for value to J. S. Previously to its being so issued, its date had been altered: Held, that the acceptor having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him, that the bill had been so altered

without the consent of the drawer and first indorser, and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law. An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law. *Downes v. Richardson and Others, Assignees of Thomson, a Bankrupt, E. 3 G. 4.*

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BILL OF SALE.

See VENDOR AND VENDEE, 3.

BOND.

1. A., B., and C., entered into a bond to the king, the condition of which was, that A., as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage-coaches. A., as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. A sci. fa. having afterwards issued upon the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that A. was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 3. c. 121. s. 8.; and, consequently, that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded.

pledged. *Westcott v. Hodges, M. 2 G. 4.* Page 12

2. The condition of a bond, after reciting that defendant and *I. S.* had delivered and indorsed to the plaintiff a bill of exchange, drawn by *I. S.* and accepted by *A. B.*, was, that defendant and *I. S.*, or either of them, their heirs, &c. should pay or cause to be paid to the plaintiff, his executors, &c. the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor to the plaintiff, his executors, &c. according to the tenor of the said bill, together with interest from the time the bill became due: Held, that to an action on this bond, it was not a good plea, that the bill when due had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and *I. S.*, or either of them. *Murray v. King, M. 2 G. 4.*

3. It is not any defence at law, to an action on a bond against a surety, that by a parol agreement time has been given to the principal. *Davey and Others v. Prendergrass, M. 2 G. 4.* 187

4. Where a bond was given under 4 G. 3. c. 38. s. 1., by a member of parliament, being a trader, and after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that the bankruptcy and certificate were no discharge to the bond. *Jameson and Another, v. Campbell, M. 2 G. 4.* 250

5. The condition of a bond, after reciting that *A.*, *B.*, and *C.*, had filed a bill in equity against *D.* and *E.*, was, that the obligee would pay all such costs as the Court of Chancery should award to the defendants on the hearing of the cause: Held,

CARRIER.

by three justices (*Abbott Cbitante*), that the death before any costs awarded could be pleaded in discharge bond. *Kipling v. Turner, 2 G. 4.* P

5. Debt on a bond given to a treasurer of a friendly Plea, that the rules of society had not been confirmed at the quarter sessions, purs 33 G. 3. c. 54.: Held, upon the murrer, that the plea was that bond being a good bond at common law. *Jones v. Woollam, E.*

BROKER.

See PRINCIPAL AND AGENT.

A pawnbroker is a broker with 5 G. 2. c. 30. s. 39., and the subject to the bankrupt. *Rawlinson v. Pearson, M. 2*

CARRIER.

1. A parcel which, with its contents, exceeded 5*l.* in value, having been delivered to *A.* and *B.*, co-carriers, to be carried by mail-coach, was accepted by *A.* to be so carried, and was so put into the mail, and carried that conveyance a short distance, it was then taken out of the coach by a servant of the carrier, and left to be forwarded by another coach, of which *A.* was not one of the proprietors, but in which he had no concern; and the parcel was lost. The carriers had duly given notice that they would not be responsible for any parcel containing specified articles which, with its contents, exceeded 5*l.* in value, if lost or damaged, unless an insurance was paid: Held, that notwithstanding this notice, the carriers were responsible for the parcel in

CERTIORARI.

- tion, in consequence of their having delivered it to be carried by another coach, of which one of the carriers only was proprietor. *Garnett and Another v. Willan and Jones*, M. 2 G. 4. Page 53
2. A parcel containing country banker's notes, of the value of 1900*l.*, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail-coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice that they would not be answerable for any parcel above *£l.* in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, Held, notwithstanding that the carrier was responsible for the loss. *Sleat and Others v. Fagg*, H. 2 and 3 G. 4. 342
3. A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners. Goods having been sent by the carrier, addressed to the order of J. S., a mere factor: Held, that the carrier had not, as against the real owner, any lien for the balance due from J. S. Query, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from J. S. *Wright v. Snell and Others*, H. 2 and 3 G. 4. 350

CERTIORARI.

The 17 G. 3. c. 56. s. 22. takes away
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the writ of certiorari only from offences for the first time, created by 22 G. 2. c. 27., and does not apply to those created by 12 G. 1. c. 34., and extended to the silk and cotton trades, by 22 G. 2. c. 27. *Rex v. Rogers*, E. 3 G. 4. Page 773

COMMISSIONERS.

See SEWERS.

An inclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account, as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging interest half-yearly was not unlawful on the ground of usury. *Eaton and Others v. Bell*, M. 2 G. 4. Page 34

COURT.

2. Where a copyholder has been admitted to a tenement and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture from shewing that the legal estate was not in the lord at the time of admittance. *Doe dem. Nepean, Bart. v. Budden*, E. 3 G. 4. Page 626

COPYRIGHT.

1. The manager of a theatre having publicly represented for profit a tragedy, altered and abridged for the stage, without the consent of the owner of the copyright, is not liable to an action, although the tragedy had been previously printed and published for sale. *Murray v. Elliston*, E. 3 G. 4. 657
2. The vendor of a print, being a copy in part of another, by varying in some trifling respects from the main design, is liable to an action by the proprietor of the original; and that although the vendor did not know it to be a copy. *West v. Francis*, E. 3 G. 4. 787

CORPORATION.

See ASSUMPSIT, 2.

COSTS.

See PRACTICE, 2. 7. 8, 9, 10. 15. 16. 28. 32. 49.

COUNTY RATE.

See JUSTICES, 2.

COURT.

By charter the king granted, that the steward and suitors of a manor should have power to hold a court for the determination of civil suits, and there had been a non-user of the court for 50 years, (except for the purpose of levying fines and suffering recoveries): Held, that this court being for the public be-

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nefit, the words of permission in the charter were obligatory, and that the right of determining suits was not lost by the non-user. *Rex v. The Steward and Suitors of Havering Atte Bower*, E. 3 G. 4. Page 691

Rex v. The Mayor and Jurats of Hastings, &c. S. P. 692

COURT LEET, STEWARD OF.

See PRACTICE, 42.

COURT OF REQUESTS.

An infant cannot be appointed to the office of clerk of a court of requests, where it is part of the duty of that officer to receive the money of the suitors. *Claridge v. Evelyn and Others*, M. 2 G. 4. 81

COVENANT.

1. A covenant to insure against fire premises situated within the weekly bills of mortality mentioned in 14 G. 3. c. 78., is a covenant that runs with the land. *Vernon v. Smith*, M. 2 G. 4. 1
2. A covenant by a lessee, that he will sufficiently muck and manure the land with two sufficient sets of muck, within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets of muck within the three last years of the term. *Pownall v. Moores*, H. 2 and 3 G. 4. 416

CRIMINAL INFORMATION.

1. The Court will grant a criminal information for a libel upon a public body of men upon an affidavit, stating the publication of the libel by the defendant. *Rex v. Williams*, E. 3 G. 4. 595
2. Where the facts tending to criminate

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minate a magistrate took place twelve months before the application to the Court, they refused to grant a criminal information, although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge till very shortly previous to the application. *Rex v. Bishop*, E. 3 G. 4. Page 612

3. An information for perjury stated, that defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out the evidence so given. The count then averred, that the defendant, at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out his evidence, which was directly contrary to that given before the House of Commons; and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions), and so the jurors aforesaid do say, that the said *E. H.* did commit wilful and corrupt perjury: Held, on motion in arrest of judgment, that this count was bad. *Rex v. Harris*, T. 3 G. 4.

926

CUSTOM.

Where in an application for a quo warranto against a constable, the affidavits in support of the rule stated that for 50 years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial: Held, that it was not sufficient. *Rex v. Lane*, H. 2 and 3 G. 4.

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CUSTOM HOUSE OFFI

See VENDOR AND VENDI PRACTICE, 27.

DAMAGES.

See PRACTICE, 27. 35.

DEBT.

See PRACTICE, 39.

DEED.

1. Where there were two assignments of the same lease or leases within the county of *lesee*, and that executed last registered first: Held, the deed last registered must, a court of law, be considered fraudulent and void in consequence of *7 Ann. c. 20. s. 1* though the party claiming the second assignment had knowledge when it was executed of the prior execution of the assignment. *Doe dem. Robin Allsop*, M. 2 G. 4. Page
2. Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor by a judgment, obtained against then owner of the land, and defendant's family had continued possession ever since: Held the original possession having taken, not under any conveyance, the length of possession was *prima facie* evidence from which the jury might infer a subsequent conveyance by the original owner to some of his descendants; but it might be rebutted, and the jury must not presume such conveyance from length of possession unless they were satisfied that it had actually been executed. *dem. Fenwick and Others v. M. 2 G. 4.*
3. By a composition-deed, re-

that the insolvent was indebted in certain sums to *J. P.* for rent, to the crown for duties, to *A.* and *B.* upon judgment, and to the other creditors in the sums of money set opposite their names in the schedule, the insolvent bargained and sold to trustees all his leasehold messuages, subject to certain mortgages, and all his personal estate whatsoever, upon trust to carry on the brewing and malting business for the benefit of the creditors, and to collect outstanding debts, and to sell the farming stock, and out of the monies arising from the sale of any part of the estate that should be mortgaged, to satisfy the mortgage, and to stand possessed of the residue upon trust to pay *J. P.* the rent due to him, the duties due to the crown, the rent which was, or thereafter should become due for any of the premises assigned, the interest upon the mortgages, then the judgment debt due to *A.* and *B.*, then to pay all the creditors whose debts did not amount to 10*l.* in full, and at the expiration of nine months, to pay all the other creditors the amount of 5*s.* in the pound. There was a covenant by the creditors that they would release their respective claims to the insolvent. The indenture contained a proviso, that in case any creditor whose debt should amount to 100*l.*, or any two creditors whose debts should amount to 150*l.* should not execute within three calendar months, the deed should be void. *A.* and *B.*, the judgment creditors, whose debt exceeded 150*l.*, did not execute the deed within the time required: Held, that the deed was not thereby rendered void, the intention manifestly being, that those creditors only who were to receive a composition under the deed, were

to execute it. *Wells v. Greenhill,*
T. 3 G. 4. Page 869

DEVIATION.

See INSURANCE.

DEVISE.

See WILL, I, 2.

1. A testator by his will bequeathed the rents of one dwelling house situate in *A.*, to *C. B.* for his life; and from and after the decease of the said *C. B.*, he bequeathed the same rents, together with the rents of all his other houses and lands unto his nephews and niece therein mentioned, for their lives and the life of the survivor; and after the decease of the survivor of them, he gave and devised all his houses and lands to trustees in trust to sell the same, and to pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estate to *C. B.*: Held, that upon the death of the testator, the nephews and niece took an immediate estate for their lives and the life of the survivor, in the rents of all the houses and lands, except the house specifically bequeathed to *C. B.* for his life. *Doe dem. Annandale and Others v. Brazier,* *M. 2 G. 4.* 64
2. *A.* by his will, devised all his messuage or dwelling house, with the appurtenances, in *High-street*, in the town of *H.*, and all and every his buildings and hereditaments in the same street to his mother for life, and after her death to *C. D.* *A.* had only one house in the *High-street*, but behind that house he had two cottages fronting a lane, called *Bake-house-lane*. There was no thoroughfare through

that lane, the only entrance into it being from the *High-street*: Held, that the two cottages passed under the will. *Doe dem. Humphreys v. Roberts*, H. 2 and 3 G. 4.

Page 407

3. Where a testator bequeathed a burgage tenement to his nephew, *J. L.*, for life, and from and after his decease, to all and every the child and children of *J. L.* lawfully begotten, or to be begotten, whether sons or daughters, they, if more than one, to take, as tenants in common, in equal shares and proportions; and for want of such issue: to his own right heirs for ever: Held, that under this devise, *J. L.* took only an estate for life, and that after his death, his children took only estates for life as tenants in common. *Doe dem. Liversage v. Vaughan and Walker*, H. 2 and 3 G. 4. 464

4. By marriage settlement certain lands were limited to the husband for life, remainder to the wife for life, and remainder to their issue. Afterwards certain freehold land in the same parish descended to the husband in fee. There was no issue of the marriage, and the husband being in possession of the freehold lands under the settlement, and the other land of which he was seised in fee, devised to his wife for life all his freehold and copyhold lands of which he was then in the immediate possession, and also all his reversionary estate, expectant on the death of his mother, in certain other lands therein mentioned, and after the decease of his wife, he devised the same to his daughter in fee, and all other his real and personal estate he devised to his wife, her executors and administrators: Held, that the freehold land which the husband held under the settlement, passed under the

particular devise in the will to wife for life, and after her death to his daughter in fee, although the wife would have taken the same estate in those lands under the settlement. *Doe dem. Netecote v. Bartle*, H. 2 and 3 G.

Page 41

5. Devise of a mansion-house and lands to trustees upon trust until *John Luscombe Manning* should attain the age of 21 years, and then to him for life, he taking and using the testator's surname *Luscombe* instead of his own surname, with limitations over to his first and other sons in strict settlement, they severally taking and using the testator's surname instead of their own. There were other limitations over to other persons. The will then contained a proviso that when any of the premises thereby devised should vest in a person not bearing the surname of *Luscombe*, that person should as soon as he should be in possession of the estate, take up himself the name of *Luscombe*, and use the same as for and instead of his own surname, and should, within three years then next after, procure his own name to be altered by act of parliament, or some other effectual way for that purpose, and in case any of the persons whom the estate was limited, who should be in possession of the same, should not take and use the testator's surname, but should neglect to get an act of parliament or some other authority as effectual for that purpose as aforesaid, in the space of three years next after he should be in possession, then the estate devised for the benefit of such persons so neglecting to get such act of parliament or other authority, should cease and become void, as if no such will had been made.

or estate had been thereby devised; and the same should immediately, upon the expiration of the three years, go over to and vest in the person next in remainder or reversion, in the same manner as if such person so neglecting to change his surname was dead without issue, upon this express condition, that such person so to take, did and should also take the testator's surname, and get an act of parliament, or some other authority as effectual for that purpose, otherwise the estate was to go over. *J. L. Manning*, before he came of age, or entered into possession of the premises demised, took upon himself, used, and bore the surname of *Luscombe* and no other. But no act of parliament had ever been obtained authorising him to change his name, nor was the king's license for that purpose obtained within three years after he so entered into possession: Held, that inasmuch as he bore the surname of *Luscombe* at the time when the estate came to him, he had substantially complied with the directions of the testator, and that he did not incur a forfeiture of that estate by not obtaining an act of parliament, or other authority, the proviso only applying to persons not bearing the surname of *Luscombe* at the time when the estate vested in them. *Doe dem. Luscombe v. Yates and Others*, H. 2 and 3 G. 4. Page 544

6. Where a testator, after bequeathing a specific legacy, devised all and every other part of his real and personal estate to be equally divided between his three grandchildren, share and share alike for ever. And also, that if either of them should happen to die without child or children lawfully

begotten, that then such part or share of the one so dying, should be equally divided amongst the surviving grandchildren; but, if any of his grandchildren should die and leave child or children lawfully begotten, that such child or children should have their parent's share equally divided amongst them, share and share alike: Held, that under this devise, the grandchildren took an estate in fee simple as tenants in common. *Clayton and Others v. Lowe*, E. 3 G. 4. Page 636

7. Where a testator, after devising his estates to his wife for life, bequeathed certain specific real property (which he described particularly) to each of his three daughters in fee, and then bequeathed the surplus remaining and book debts, ready money, monies in the funds upon bond, and otherwise, whatsoever, share and share alike, to be divided amongst his three daughters, to be paid them severally at 22, their equal share and the interest in the meantime, and in case either of them die before 22, or single, or before marriage, that the deceased's portion should be equally divided between the two survivors, share and share alike, or their heirs; and in case two died without heirs, that the whole should devolve to the survivor and her heirs, "in case no husband was living. If so, they enjoy the property during life only, and afterward her or their fortune goes to the heir or heirs of the survivor or survivors, as heirs at law;" and that in case all his three daughters die without heirs and leave no husband living, or at the decease of the said husband or husbands, certain legacies should be paid "out of the before mentioned estates;" and that all the residue

of the estates should be sold and equally divided, share and share alike amongst his (the testator's) brothers and sister: Held, that this latter devise extended both to the real and personal estate, and that the husbands of each of the daughters by necessary implication took an estate for life in the real property bequeathed to their respective wives. *Doe dem. Driper and Others v. Bowling*, E. 3 G. 4.

Page 722

8. Devise to *A.* for 99 years, if he should so long live; remainder to his first son, then unborn, for 99 years, if he should so long live, and so on in tail male to such first son lawfully issuing for ever, and for want and in default of such issue of such first son, to the second and other sons successively for 99 years only, in case he should so long live; and that such elder son, or the issue of such elder son, should have no greater estate than for 99 years, determinable at his decease; and if there should be no issue male of *A.* at the time of his (*A.*'s) death, or in case there should be such issue male at that time, and they should all die before 21 without issue male, then to *B.* for 99 years, if he should so long live; remainder to the first son of *B.* for 99 years, if he should so long live, &c.: Held, that *A.* took under the will an estate for 99 years in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue, and that, upon his death, his first son would take an estate for 99 years in the freeholds, determinable with his life, and the remainder of the terms in the leaseholds: but, that the limitations to the second and other unborn sons of *A.* were void as tending to perpetuity; and the

limitations over to *B.* & these void limitations, accelerated, but were void. *Beard v. Westcott and Others*, 3 G. 4.

9. A testator devised certain lands to his daughter for life, after her decease, to her son, infant, for life; and after termination of that estate feiture, or otherwise to preserve contingent rents but to permit *A. B.* to the profits during his life, after the decease of *A. B.*, then heirs of his body for ever devise over in case of the death of his issue: Held, that this took an estate tail in rem. *Measure v. Gee*, T. 3 G. 4.
10. *R. Lowe* by will devised landed estates to trustees, who bequeathed 10,000*l.* as a portion to his daughter *C. L.*, but in case she should marry any one of his kinsmen named in the will, gave to which ever of them married, certain estates specified, he taking the residue. *Lowe* and settling upon an annuity of 1000*l.* a-year during his life, and in case that circumstance did not take place, his daughter *C. L.*, he then directed that it might be offered to the other daughter *A. L.* in particular; and in case she should marry in the manner above mentioned, then directed that his daughters should have 10,000*l.* each, and in the event of his death, he gave all his estates to his kinsman, for ever, on his heirs, taking the name of him irreversibly. After the execution of this will, *C. L.* married one who was not one of the persons named in the will, who have become entitled to the estate after she married him, as directed.

testator paid her a married portion; and afterwards by a codicil to his will reciting her marriage, and that he had given her a fortune, he revoked all devises and bequests in her favour contained in his original will, and also all claim which her husband *W. H.* might have to any of his real and personal estates by virtue of his marriage with his daughter *C. L.*, and by virtue of his said will, and in lieu thereof, he bequeathed unto each of their children a pecuniary legacy; and he then directed, that in case his other daughter should marry either of the persons mentioned in his will, then upon condition, that either of those persons whom she married and his heirs would accept, take and use the name of *Lowe* only, he gave all his real and personal estate unto such of those persons whom she married, and his heirs; and in case his daughter *A. L.* should not marry either of the persons mentioned in his will, or if she married one of them, and he refused to accept, take, and use the name of *Lowe*, in that case he revoked all his devises and bequests contained in his will and codicil in her favour, and in lieu thereof bequeathed her 10,000*l.* The testator died soon after the date of his codicil, and his daughter *A. L.* afterwards married *T. F.*, who was not one of the persons named in the will, who would have been entitled to the estate in the event of her having married him, and upon that occasion, the 10,000*l.* was paid to her, and *W. D.* then entered upon the testator's estates, and took upon himself the name of *Lowe*, and suffered a recovery; Held, that *W. D.* was seized of an indefeasible estate in fee simple in the estate in question. *Lowe v.*

Sir William Manners, Baronet, T.
3 G. 4. Page 917

DISTRESS.

See LANDLORD AND TENANT, 2.

LEASE, 2.

DOWER.

Certain lands were conveyed to *A. B.*, his heirs and assigns, to such uses as *C. D.* should by deed appoint; and in default of, and until appointment, to the use of *C. D.* in fee, *C. D.* afterwards, in execution of the power by deed duly made an appointment of the said estates in favour of *E. F.* in fee. *C. D.*, at the time of making the appointment, was married. His wife was held not to be dowable out of these lands. *Ray v. Pung,*
E. 3 G. 4. Page 861

ECCLESIASTICAL COURT,
JURISDICTION OF.

See WARRANT, 1.

EJECTMENT.

1. The growing crops of a tenant having been seized under a *f. fa.* a writ of *hab. fac. poss.* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord founded on a demise made long before the issuing of the *f. fa.* Held, that the sheriff was not bound to sell the growing crops under the *f. fa.*, inasmuch as they could not in point of law be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: Held, also, that the sheriff had no right to allow to the landlord a year's rent, under the statute of 8 Ann. c. 14., that statute contemplating an existing tenancy, which in this case, must be taken to have ceased on the day of the demise

- demise in the ejectment. *Hodgson and Others, Assignees of Seaton v. Gascoigne*, M. 2 G. 4. Page 88
2. The declarations of a widow in possession of premises, that she held them for her life, and that after her death they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession. *Doe dem. Human v. Pettett*, M. 2 G. 4. 223
3. Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor, under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since: Held, that the original possession having been taken not under any conveyance, the length of possession was only *prima facie* evidence from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed. *Doe dem. Fenwick v. Read*, M. 2 G. 4. 232
4. Where a rule has been obtained for staying the proceedings in ejectment, till the costs of a former ejectment have been paid, the Court will not interfere, and permit the defendant, in case those costs are not paid before a certain day, to be named by the Court to non pros. the ejectment pending. *Doe dem. Sutton v. Ridgway*, H. 2 and 3 G. 4. 523
5. Where a copyholder has been admitted to a tenement, and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture, from shewing that the legal estate was not in the
- lord at the time of admittance. *Doe dem. Nepean v. Budden*, 3 G. 4. Page 6
6. The notice to the tenant in possession at the foot of the declaration in ejectment, need not be the name of the plaintiff; but, in the name of the lessor of the plaintiff, or even any other person the Court will permit the rule of judgment against the casual ejector to be drawn up. *Goodtitle de Duke of Norfolk v. Nottelle*, 3 G. 4. 54

ESTREAT.

- Rex v. The Inhabitants of Hardwick*, M. 2 G. 4. 17
2. During the minority of a child there can be no emancipation, unless he marries, and so become himself the head of a family, or contract some other relation, so as wholly and permanently to exclude the parental control. *Sensible*, that the acquiring a settlement of his own does not properly constitute an emancipation. *Rex v. The Inhabitants of Wilmington*, H. 2 and 3 G. 4. 52

EMANCIPATION.

1. A pauper being eighteen years of age, and residing with his father was drawn as a militia-man, and served for five years as a ballot man. During his service he, several times when on furlough, and finally after his discharge from the militia, returned to his father's house: Held, that by his remaining separated from his father's family after twenty-one, he was emancipated, although the original separation was not voluntary on his part. *Rex v. The Inhabitants of Hardwick*, M. 2 G. 4. 17
2. During the minority of a child there can be no emancipation, unless he marries, and so become himself the head of a family, or contract some other relation, so as wholly and permanently to exclude the parental control. *Sensible*, that the acquiring a settlement of his own does not properly constitute an emancipation. *Rex v. The Inhabitants of Wilmington*, H. 2 and 3 G. 4. 52

ESTOPPEL.

See RELEASE, 1. PLEADING, 25.

ESTREAT.

See PRACTICE, 19.

EVIDENCE

EVIDENCE.

1. Declaration stated, that, in consideration that plaintiff would assign to the defendant a bill of exchange, defendant undertook, &c., and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter however paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement the plaintiff, by deed, assigned to the defendant the bill, and all sums of money due thereon, to and for the defendant's own use ; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill : Held, that the declaration importeth that the plaintiff had made an absolute assignment of the bill, and, consequently, that the assignment in evidence being only conditional, this was a fatal variance. *Vansandau v. Burt*, M. 2 G. 4. Page 42
2. In trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff; and, during such imprisonment, struck, pulled, and pushed him about ; justification, that defendant arrested plaintiff under process of court, and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c. : Held, that this latter part of the justification not being proved, the plaintiff was entitled to judgment, and that it was not necessary to new assign the battery by the defendant. Held, also, the second count of the declaration (which omitted the battery) having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses as laid in the first count. *Phillips v. Howgate*, M. 2 G. 4. Page 220
3. The declarations of a widow in possession of premises, that she held them for her life, and that after her death, they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had 20 years adverse possession. *Doe dem. Human v. Pettett*, M. 2 G. 4. 223
4. Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since : Held, that the original possession having been taken not under any conveyance, the length of possession was only *prima facie* evidence, from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed. *Doe dem. Fenwick v. Reed*, M. 2 G. 4. 232
5. Where an assignment of a lease by deed, taken in execution was made in the name and under the seal of office of the sheriff, by A.B., acting as under-sheriff : Held, that such assignment was sufficiently proved, without proving further the appointment of A.B., as under-sheriff, and that he had power by deed to execute deeds in the name of the sheriff. *Doe dem. James v. Brown*, M. 2 G. 4. 243
6. An issue having been directed to satisfy the Court as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence

evidence satisfactory to the Judge who tried the cause, and to the Court upon his report of it. In the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, from his knowledge of hand-writing in general, that the signature in question was not genuine, but an imitation ; this evidence having been rejected, the Court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight, and that the issue being to satisfy the Court, a new trial ought not to be granted, unless for the rejection of evidence which might reasonably have altered the verdict. *Quare, if* such evidence be admissible at all. *Gurney v. Langlands, H. 2 and 3 G. 4.* Page

7. An estate in fee, upon the determination of a life estate, was devised to the wife of *A. B.* *A. B.* was one of the attesting witnesses to the will. The testator died in 1179, and the wife of *A. B.* died in 1819, before the previous life estate was determined: Held, that *A. B.* was not a good attesting witness to this will. *Hatfield v. Thorn*. E. 3 G. 4. 589

8. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person, speaking of the plaintiff's conduct, and the declaration in setting it out, had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal. *Cartwright v. Wright*. E. 3 G. 4. 615

9. Where a copyholder has been admitted to a tenement, and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture, from shewing that the legal estate was not in the lord

at the time of adm.
dem. *Nepean v. Buda*

10. To an action on bill the defendant pleaded a set-off to all but a part, i.e. part a tender. Repudiated after the cause of action had been tried and before the tender was demanded, the plaintiff contended that this issue would have been raised if the ported by proof of the precise sum tendered. *Griffiths v. E. 3 G. 4.*

11. A petition, addressed to the editor of an officer in the secretary at war, being made with a view of obtaining his interference, the particular debt due, and contained statement of facts which, though gatory to the officer's action, the creditor believed to be not a malicious libel for action is maintainable. The action, even upon the general evidence may be rejected, if it appears that the writer bona fide believed the facts stated in the petition to be true. *Fairman v. 3 G. 4.*

12. A bill against an attorney filed of Michaelmas term, appeared by the memorandum have been filed on the 24th of November: Held, that evidence is admissible to shew that it was not so filed on the 24th. Held, also, that a demurrer to the evidence of a version; and, therefore, the deeds were in defendant's possession prior to Michaelmas term, the demand and refusal were on the day after the 24th, that this was evidence of a conversion before the action was held, that this was evidence of a conversion before the action was held. *Wilton v. Girdlestone, 1 G. 4.*

13. Where premises had been misused by two tenants in common, one of whom had been ejected, the other could not be compelled to pay the rent. *Wright v. 1 G. 4.*

FACTOR.

and the rents for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid accordingly, and separate receipts given: Held, that it then became a question of fact for a jury to say, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each. *Powis v. Smith*, T. 3 G. 4. Page 850

EXECUTION.

See FIERI FACIAS.

EXECUTOR.

The property of a deceased person vests in his executor from the time of his death, in an administrator, from the time of the grant of the letters of administration; and, therefore, where A. took out letters of administration under a will, by which he was appointed executor; and after notice of a subsequent will, sold the goods of the testator: Held, that the rightful executor in an action of trover was entitled to recover the full value of the goods sold, and A. was not entitled, in mitigation of damages, to shew that he had administered the assets to that amount. *Woolley, Executrix, v. Clark*, E. 3 G. 4. 744

EXECUTORY DEVISE.

See DEVISE, 8.

EXTRA-PAROCHIAL DISTRICT.

See SETTLEMENT, 4.

FACTOR.

The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him

FIERI FACIAS. 989

for sale; the factor being also similarly indebted to I. S., sold the goods to him. The factor afterwards became bankrupt; and, on a settlement of accounts between I. S. and the assignee, I. S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees, afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3. sess. 2. c. 28. s. 29.
" All contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by A., sold the same, and entered the contract in his book, as having been made for C., the master of the ship. It was not signed by the purchaser; but, in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted; the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. *Quare*, whether, under the circumstances, an action might be brought in the name of C. for the price of the coals. *Hudson v. Granger*, M. 2 G. 4. Page 27.

FEME COVERT.

See COPYHOLD, 1. PRACTICE, 23.

FIERI FACIAS.

1. The growing crops of a tenant having

- having been seized under a fi. fa., a writ of hab. fac. poss. was subsequently delivered to the sheriff, in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of the fi. fa.: Held, that the sheriff was not bound to sell the growing crops under the fi. fa., inasmuch as they could not in point of law be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration. *Hodgson v. Gascoigne*, M. 2 G. 4. Page 88
2. A sheriff has no right, under a fi. fa., to seize fixtures, where the house in which they are situated is the freehold of the person against whom the execution issues. *Winn v. Ingilby, Bart. and Another*, E. 3 G. 4. 625

FINE.

See MORTGAGOR AND MORT-GAGEE, 2.

By marriage settlement, dated December, 1806, certain manors and lands were limited to the husband for life, remainder to the wife for life, remainder to the use of the first and other sons of the marriage successively in tail male; remainder in case the wife should survive the husband, to her in fee; but if she should die in the lifetime of her husband, remainder to the daughters successively in tail male; remainder to the use of such persons related by blood or consanguinity, and in such estates or interests, and in such manner, and charged with such sums of money in favour of such persons so related, as she by her will might appoint; and in case of no such appointment, to her in fee. The settlement also contained a power for the trustees there named, at the request, and by the direction of the husband

and wife, or the survivor or exchange the settle and for that purpose, all and any of the uses in the settlement; and a nant by the husband for assurance on his part, a his wife, and all persons under him. In pursuan settlement, certain fines vied. By deed, dated 1807, reciting the settled the fines levied in pursuan of, and the limitations the tained, and further, that was desirous of acquiring lute power of appointme the manors, &c. comprise settlement, in the event surviving, or dying in the of her husband, and ther a general failure of issue body, inheritable to the &c. under the settlement, band and wife covenanted certain fines, sur conus droit come CEO, with ptiions, to J. G. and his hei the manors, &c. comprise settlement: which fines operate, and to be taken t ate, first, for corroborat uses contained in the set antecedently to the limita the use of the wife in fee and subject thereto to the such persons, &c. as the will or deed might appoint pursuance of this latter de veral fines come CEO were by the husband and wife: that, under these circum these latter fines did not to extinguish, destroy, or the right or power of the band wife, and the survivor o to request and direct a sale change of the settled estate the powers for that purpo tained in the settlement, s prevent an exercise of those

FORFEITURE.

by the trustees. *The Earl and Countess of Jersey and Others v. Deane*, E. 3 G. 4. Page 569

FIXTURES.

A sheriff has no right under a *fi. fa.* to seize fixtures, where the house in which they are situated is the freehold of the person against whom the execution issues. *Winn v. Ingilby*, E. 3 G. 4. 625

FORFEITURE.

See COPYHOLD, 2.

Devise of a mansion-house and lands to trustees, upon trust until *John Luscombe Manning* should attain the age of 21 years, and then to him for life, he taking and using the testator's surname of *Luscombe* instead of his own surname, with limitations over to his first and other sons in strict settlement, they severally taking and using the testator's surname instead of their own. There were other limitations over to other persons. The will then contained a proviso, that when any of the premises thereby devised should vest in any person not bearing the surname of *Luscombe*, that person should, as soon as he should be in possession of the estate, take upon himself the name of *Luscombe*, and use the same as for and instead of his own surname, and should, within three years then next after, procure his own name to be altered to the testator's surname of *Luscombe* by act of parliament, or some other effectual way for that purpose, and in case any of the persons to whom the estate was limited, and who should be in possession of the same, should not take and use the testator's surname, but should neglect to get an act of parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after

FOREIGN ATTACHMENT. 991

he should be in possession, that then the estate devised for the benefit of such persons so neglecting to get such act of parliament, or other authority, should cease, and become void, as if no such use or estate had been thereby devised; and the same should immediately, upon the expiration of the three years, go over to and vest in the person next in remainder or reversion, in the same manner as if such person so neglecting to change his surname was dead without issue, upon this express condition, that such person so to take did and should also take the testator's surname, and get an act of parliament, or some other authority as effectual for that purpose, otherwise the estate was to go over again. *J. L. Manning*, before he came of age, or entered into possession of the premises devised, took upon himself, used, and bore the surname of *Luscombe* and no other. But no act of parliament had ever been obtained authorising him to change his name, nor was the king's license for that purpose obtained within three years after he so entered into possession: Held, that inasmuch as he bore the surname of *Luscombe* at the time when the estate came to him, he had substantially complied with the directions of the testator, and that he did not incur a forfeiture of that estate by not obtaining an act of parliament, or other authority, the proviso only applying to persons not bearing the surname of *Luscombe*, at the time when the estate vested in them. *Doc. dem. Luscombe v. Yates*, H. 2 and 3 G. 4. Page 544

FOREIGN ATTACHMENT.

The 19 G. 3. c. 70. s. 4. is confined to those suits in inferior courts where

where the proceedings are similar to those in the superior courts; and, therefore, does not extend to the case of a foreign attachment.
Bulmer v. Marshall, *T. 3 G. 4.*

Page 821

FRAUDS, STATUTE OF.

1. The agent contemplated by the 17th sect. of the statute of frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and, therefore, where an auctioneer wrote down the defendant's name by his authority opposite to the lot purchased: Held, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute.
Farebrother v. Simmons, *H. 2 and 3 G. 4.* 393
2. *A.*, a merchant in *London*, had been in the habit of selling goods to *B.*, resident in the country, and of delivering them to a wharfinger in *London*, to be forwarded to *B.* by the first ship. In pursuance of a parol order from *B.*, goods were delivered to and accepted by the wharfinger to be forwarded in the usual manner: Held that this, not being an acceptance by the buyer, was not sufficient to take the case out of the 29 Car. 2. c. 3. s. 17.
Manson and Another v. Armitage, *H. 2 and 3 G. 4.* 857
3. An estate in fee upon the determination of a life estate, was devised to the wife of *A. B.*; *A. B.* was one of the attesting witnesses to the will. The testator died in 1779, and the wife of *A. B.* died in 1813, before the previous life estate was determined: Held, that *A. B.* was not a good attesting witness to this will.
Hatfield v. Thorp, *E. 3 G. 4.* 589
4. Where there was a verbal contract

HABEAS CORPUS.

by the plaintiffs, who were mi
for the sale of a quantity of
which, at the time, was not
pared, and in a state capab
immediate delivery: Held,
this was a contract for the sal
goods within 29 Car. 2. c. 3. s.
Garbutt v. Watson, *E. 3 G.*
Page

5. A horse was sold by verbal
tract, but no time was fixed
the payment of the price.
horse was to remain with the
dor for 20 days without any ch
to the vendee. At the expira
of that time the horse was
to grass, by the direction of
buyer, and by his desire enter
as the horse of one of the vend
Held, that there was no acc
ance of the horse by the ven
within 29 Car. 2. c. 3. s. 17. *Ca*
v. Toussaint, *T. 3 G. 4.*

FREEHOLD.

See FIXTURES, 1.

FRIENDLY SOCIETIES.

See PLEADING, 27.

GAME.

In order to constitute the offence
keeping a setting dog, within
5 and 6 Anne, c. 14, s. 4., the d
must be kept for the purpose
killing and destroying game; a
therefore, where it appeared th
at the time when the alleged
fence was charged to have be
committed, the dog was tied
and never went out into the fi
with its master, this was held
to be an offence within the statu
Hayward v. Horner, *H. 2 a*
3 G. 4. 8

HABEAS CORPUS.

See PRACTICE, 20.

HARBOUR DUES.

An act of parliament, imposing a teenage duty on vessels coming into the harbour of Dover, contained an exception of all vessels employed in his majesty's service: Held; that a vessel hired by the postmasters-general to carry the mails and government dispatches to and from Dover to Calais, &c. the master of which was permitted to carry passengers and their luggage, and bullion, upon freight, is a vessel coming within the exception. *Hamilton v. Stow, E. 3 G. 4.*

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HIGHWAY.

See INCLOSURE ACT, 4.

Two magistrates authorised the surveyor of a turnpike road which ran through twenty-nine townships, to collect for the repair of the road, a composition in lieu of the statute duty. The surveyor was not examined upon oath as to the necessity of the composition. He afterwards made an assessment of six-pence in the pound upon the annual value of the lands of a particular township through which the turnpike road passed. The sum to be collected under the assessment was the utmost which the surveyor of the turnpike roads could in any case demand from the inhabitants of the township, and much exceeded what was required to put that part of the road lying in the township into complete repair. The turnpike surveyor having returned the assessment to the surveyor of the highways of the township, directed him to collect the sums therein mentioned. Upon a refusal to pay the sum assessed by an inhabitant of the township, two magistrates granted a warrant of

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distress to levy the same: Held, that the warrant was bad, the magistrates having no jurisdiction whatever, upon the ground that, in order to legalise the demand under the assessment, it ought to have been previously ascertained how many days' statute duty would be required to put the road into complete repair, the composition being demandable only in respect of that number of days statute duty.

Semblé, that in order to justify magistrates in granting an authority to collect a composition in lieu of statute duty, it should be made to appear upon oath, to both the magistrates present, that the road can be more effectually repaired by such composition.

Semblé, also, that where the composition is to be collected in several townships, it ought to appear on the face of the authority itself, that, in the judgment of the magistrates, a composition, in lieu of statute duty, is advisable in each particular township. *Stanley, Bart. v. Fielden and Others, H. 2 and 3 G. 4.*

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INCLOSURE ACT.

1. A., having purchased an estate free from rectorial tithes, with a right of common thereto unexacted; the common was afterwards inclosed under an act of parliament, and certain land was allotted to A. in lieu of his said right of common: Held, that no tithe was payable in respect of the allotted land. *Stode v. Morris, M. 2 G. 4.*
2. An inclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the sum money raised by the commissioners. *3 T. et al.*

ers. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rents in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging of interest half-yearly was not unlawful on the ground of usury. *Eaton and Others v. Bell*, M. 2 G. 4.

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3. By an inclosure act it was enacted, that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed, unto the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were required to distinguish by their award the several allotments to the impropriate rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes: Held, under this act, that the tithes were not extinguished until the commissioners made their award. *Ellis v. Arnison*, M. 2 G. 4.

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4. By a clause in an inclosure act, a commissioner was authorised to stop up any way, provided it be done by the order, and with the concurrence of two justices, and that order was to be subject to an appeal in

like manner, and under such restrictions, as if the same had been originally made by statutes. By a subsequent act any party aggrieved was to have liberty to appeal at any time within six months after the cause of complaint. Under this act, the commissioner, with the concurrence of two justices, might stop up a road without giving sufficient notice required by the c. 68.: Held, that a person aggrieved might, under the circumstances, appeal at any time within six months. Questioned whether it be necessary to give notice where roads are stopped up under the provisions of the closure act. *Rex v. Towneley*, 2 and 3 G. 4. Pa

INDICTMENT.

See CRIMINAL INFORMATIC

INFANT.

1. An infant cannot be appointed to the office of clerk of a Court of Requests, where it is part of the duty of the officer to receive money of the suitor. *Clarke v. Evelyn*, M. 2 G. 4.
2. Where an infant held himself as in partnership with J. S. continued to act as such till a short period of his coming of age, but there was no proof of his doing any act as a partner after the age of twenty-one: Held, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one, and as he had neglected to do so, that he was responsible to J. S. who had trusted J. S. with his money subsequently to the infant's attaining twenty-one, on the ground of the partnership. *Goode and Harrison v. Harrison* (in error), 2 G. 4.
3. Where judgment of nonsuit had been given in an action brought by an infant,

against an infant, it is no ground of error that the infant had appeared by attorney. *Bird v. Pegg, H. 2 and 3 G. 4.* Page 418

INSOLVENT ACT.

See PRACTICE, 26.

INSURANCE.

See COVENANT, 1.

1. By a policy, a ship was insured at and from *Hull* to her port or ports of loading in the *Baltic Sea* and *Gulf of Finland*, with liberty to proceed to and touch and stay at, any port or ports whatsoever, for any purpose, particularly at *Elsinore*, without being deemed a deviation. The ship touched and stayed at *Elsinore* and *Dantzic*, to deliver goods, *Pillau* being her port of loading: Held, that this was a deviation. *Solly and Another v. Whitmore, M. 2 G. 4.* 45
2. A policy was effected on living animals, warranted free from mortality and jettison. In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed; and others, from the same cause, received such injury that they died before the termination of the voyage insured: Held, that this was a loss by a peril of the sea, for which the underwriters were liable. *Lawrence v. Aberdeen, M. 2 G. 4.* 107
3. Where, in an action on a policy of insurance on ship, in the usual form, for twelve months, at sea and in port, the loss averred was as follows: that the ship having arrived at the harbour of *St. J.*, and discharged her cargo, it became necessary to place her, and she was accordingly placed, in a graving-dock, there to be repaired, and near to a certain wharf in the graving-dock; and that, whilst she

was there, by the violence of the wind and weather, she was thrown over on her side, whereby she struck the ground with great violence, and was bilged, &c.: Held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes, &c." for which the underwriters were liable. Held, also, that the above facts, with the additional circumstance of there being two or three feet water in the graving dock when the accident happened, did not amount to a loss by perils of the sea. *Phillips and Another v. Barber, M. 2 G. 4.*

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4. The underwriters on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners. *Walker v. Maitland, M. 2 G. 4.* 171
5. Where, during the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there: Held, that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of such voyage. *Rayner v. Godwind, M. 2 G. 4.* 225
6. Insurance from *London* to *Jamaica* generally. The goods insured were destined to a particular place in the island, and the usual course in such cases was for the ship to proceed to an adjoining port, and there to tranship the cargo into shallops; but no information of this was given to the underwriters: Held, notwithstanding, that they were

- were liable for a loss occurring after such transhipment on board the shalllops. *Stewart v. Bell, M. 2 G. 4.* Page 238
7. Where a ship and cargo was baratrously taken out of her course by the crew, and the ship and part of the cargo sold, and the remainder sent home by another vessel : Held, that this was a total loss of the cargo from the time of the committing of the act of barratry. *Dixon v. Reid, E. 3 G. 4.* 597

INTEREST.

See ADMINISTRATOR, 1.

IRISHMAN.

See SETTLEMENT, 3.

JUDGES' CERTIFICATE.

See PRACTICE, 32.

JURISDICTION.

See JUSTICES, 1, 2.

JUSTICES.

1. It is not necessary, in order to give the justices at sessions jurisdiction, to hear an appeal against overseers' accounts, that such accounts should previously have been examined and allowed pursuant to 50 G. 3. c. 49. *Rex v. The Justices of Colchester, H. 2 and 3 G. 4.* 535

2. The proviso in 55 Geo. 3. c. 51. s. 1., stating that that act shall not give any jurisdiction to the justices of the county over any places situated within the limits of any liberties or franchises having a separate jurisdiction, is confined to franchises having a separate jurisdiction co-extensive with that possessed by the county justices ; and, therefore, where the justices of the city of B. had no jurisdiction by charter to try felons, it was held that the

city of B. was liable to rate. *Rex v. Clarke,*

3. An order of sessions for and paying to the treasurer of the county a sum to enable him to reimburse certain persons for a precedent debt, although he had been incurred for expenses, is bad. *Rex v. The Sheriff of Flintshire, E. 3 G. 4.*

1. The growing crops of having been seized under a writ of hab. fac. posse, subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a demise long before the issuing of the writ. Held, that the sheriff was bound to sell the growth under the f. fa., inasmuch as he could not, in point of law, be considered as belonging to the landowner, the latter being a trespasser on the day of the demise in the declaration : Held, also, that the sheriff had no right to allow the landlord a year's rent, in accordance with the statute of 8 Ann. c. 14., the same not being contemplated as existing at the time which in this case must be deemed to have ceased on the date of the demise in the ejectment. *v. Gascoigne, M. 2 G. 4.*

2. A landlord has no right to distrain, unless there be a valid demise to the tenant at a rent ; and, therefore, if the tenant was in possession, on a memorandum of agreement on lease, with a purchasing for 21 years, at the net rent of 6*l.*, the tenant to enter time on or before a particular day. Held, that this is only a memorandum of agreement for a future lease, and that no lease having been executed, and no rent

1. quarterly paid, the landlord was not entitled to distrain. *Dank v. Hunter*, H. 2 and 3 G. 4. Page 322
2. A covenant by a lessee, that he will sufficiently muck and manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets of muck within the three last years of the term. *Pownall v. Moores*, H. 2 and 3 G. 4. 416
4. Where, by a local act, it was provided that a drainage tax should be paid by the tenants of the lands and grounds charged with the same, who might deduct and retain the same out of the rents payable to their landlord. And also, that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear, and if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let in discharge of the tax; Held, that the tenants to be charged with the tax, were those in whose time the tax accrued due, and not the tenants for the time being. And, therefore, where an outgoing tenant having paid his rent in full, had left property on the premises, which was afterwards distrained for the tax due during his tenancy, and he was obliged to pay it: Held, that he might recover the same in an action against his landlord for money paid. *Dawson v. Linton*, H. 2 and 3 G. 4. 521
5. Where a copyholder has been admitted to a tenement and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture, from shewing that the legal estate was not in the lord at the time of admittance. *Doe dem. Nepean v. Budden*, E. 3 G. 4. Page 526
6. A tenancy by virtue of an agreement in writing for three months certain, is a tenancy "for a term" within the meaning of the 1 G. 4. c. 87. *Doe dem. Phillips v. Roe*, E. 3 G. 4. 766
7. Where a tenant holds from year to year, but without a lease or agreement in writing, it is not a case within 1 G. 4. c. 87. s. 1. *Doe dem. Earl of Bradford v. Roe*, E. 3 G. 4. 770
8. Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill; and it was afterwards seized under a fi. fa. by the sheriff, and sold by him: Held, that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term. *Forsen v. Thompson*, T. 3 G. 4. 826
9. By lease granted in 1814, and to take effect from 1820, certain houses, together with a piece of ground which was part of an adjoining yard, were leased to a tenant, together with all ways with the said premises or any part thereof used or enjoyed before. At the time of granting the lease, the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain right of way to every part of that yard: Held, that the lessee was entitled to such right of way to the part of the yard demised to him. *Kooystra v. Luise*, T. 3 G. 4. 830
10. Where premises had been demised

mised by two tenants in common, and the rent for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid accordingly, and separate receipts given : Held, that it then became a question of fact for a jury to say, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each. *Powis v. Smith*, T. 3 G. 4. Page 850

11. Two messuages were conveyed to such uses as *A.* should appoint, and in default of appointment to *A.* for life, and after the determination of that estate in his lifetime to *B.* for the life of *A.*, in trust for *A.* and his assigns; with remainder to *A.* in fee. *A.* leased both these messuages to a tenant at an entire rent of 65*l.* 10*s.* for a term of years, and during the continuance of that term, contracted to sell the reversion of one of the messuages to *C.* In the contract the messuage was described on lease, together with another, and that the apportioned rent in respect of it was 40*l.* *A.* and *B.* afterwards conveyed the reversion of both houses, and the entire rent of 65*l.* 10*s.* unto *C.* to certain uses, viz. as to the said messuage which *A.* had contracted to sell, and the yearly rent of 40*l.*, together with all powers and remedies reserved for recovering the rent of 65*l.* 10*s.* to such uses as *A.* should appoint; and as to the other messuage and the residue of the entire rent, to the use of *A.* in fee. *A.* afterwards appointed the messuage which he had contracted to sell, and the apportioned rent to the vendee: Held, that the latter did not acquire the same rights and remedies against the lessee as he would have acquired if the rent

had been legally apportioned by a jury, the lessee for the being bound by an appointment made without his consent. *v. Collins*, T. 3 G. 4.

LEASE.

- Where there were two or more assignments of the same leasehold premises within the county of *Sex*, and that executed or registered first : Held, that a deed last registered, in the court of law be considered fraudulent and void, in consequence of 7 Ann. c. 20. s. though the party claiming the second assignment had knowledge, when it was executed, of the prior execution of the first assignment. *Doe dem. A. v. Allsop*, M. 2 G. 4.
- By a private act passed in the year 1720, certain estates settled in strict settlement, the power was reserved to the five tenants in tail, by lease of any part of the lands settled, "for the term of lives or twenty-one years, any term or number of years determinable upon the death of three lives, upon every such lease to be reserved, and made payable during the continuance of the usual and accustomed rents, boons, and services, the same; and, so as there should be retained therein, a condition of entry for non-payment of rent, and rents thereby to be served." By lease, dated January, 1785, a tenant in the said estates demised a part of the premises thereby, to be held from the date of the lease for ninety-nine years, if three persons therein named should so long yield and pay the yearly

every year during the said term, unto the lessor, the yearly rent of 50*l.* upon the 25th *March* and 29th *September*, by even and equal portions, the first payment to be made on the 25th of *March* ensuing the date of the lease. There was a proviso that, if the rent should not be paid on those days, or if certain amerciaments and fines therein mentioned, after reasonable demand, should not be paid, it should be lawful for the lessor, his heirs, and assigns, to re-enter and distrain, and the distress to take away, detain, and keep, until the rent be satisfied; and there was the following proviso for re-entry: "that in case the said yearly rent should be unpaid for the space of twenty-eight days after it became due, being lawfully demanded, it should be lawful for the lessor, his heirs, and assigns, to re-enter."

Previous to the time of passing the act, the premises demised by this lease had been demised jointly with other premises by the settlor's ancestor, by a lease bearing date 2d *February*, 1708, "for ninety-nine years, determinable upon three lives, at a yearly rent of 82*l.* payable on the same days as those mentioned in the lease of the 6th *January*, 1785, and the first payment to commence on the 25th *March* ensuing the date of the lease." It contained also a similar power for the lessor to distrain, and a power of re-entry, upon the rent being behind for twenty-eight days, upon its being lawfully demanded, and not paid, and no sufficient distress being found upon the premises. It did not appear whether any other lease was granted between that period and the year 1756. At that time another lease of the premises, demised by the lease of the 6th *January*, 1785, was granted at a rent of 32*l.* pay-

able at the same period as in the other leases, containing the same powers of distress and re-entry for non-payment of rent as those in the lease of the 6th *January*, 1785:

Held, first, that it was not a valid objection to the lease of the 6th *January*, 1785, that the rent was made payable on the 25th *March* and 29th *September*, (although the term commenced on the 6th *January*, and that therefore there was a beforehand rent, which might prejudice the remainderman,) inasmuch as the rent was made payable on the same days by the former lease, and, therefore, this was the usual and accustomed rent:

Held, secondly, for the same reason, that it was no objection to the lease that the rent was made payable by half-yearly payments, although the power required it to be payable yearly; the word *yearly* meaning a payment of rent in the year:

Held, thirdly, that it was no objection to the lease, that by the terms of it the landlord could distrain only after a reasonable demand, and that he was bound to detain the distress until the distress was satisfied; for this being a clause introduced for his benefit, he was not thereby abridged of any right of distress which he had by common law, or of sale, under the statute 4 and 5 *W. & M.*:

Held, fourthly, that it was no objection to this lease, that the clause of re-entry reserved the right of entry to the landlord upon the rent being twenty-eight days in arrear, for this was a reasonable condition of re-entry, and was conformable to the old lease. Nor was it any objection that the right of entry was made to depend upon the rents being lawfully demanded,

for the landlord was not thereby deprived of the benefit of the 4 G. 2. c. 28., and consequently was entitled by that statute to enter without making any demand:

Held, also, that part of the premises formerly demised jointly with others at one entire rent, might be let under the terms of this power at a rent bearing the same proportion to the old rent, that the premises demised by the lease bore to the whole premises formerly demised. *Doe dem. Earl of Shrewsbury v. Wilson*, H. 2 and 3 G. 4. Page 363

3. A covenant by a lessee that he will sufficiently muck and manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenants laying on two sets of muck within the three last years of the term. *Pownall v. Moores*, H. 2 and 3 G. 4. 416

LIBEL.

1. The Court will grant a criminal information for a libel upon a public body of men, upon an affidavit, stating the publication of the libel by the defendant. *Rex v. Williams*, E. 3 G. 4. 595

2. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal. *Cartwright v. Wright*, E. 3 G. 4. 615

3. A petition addressed by a creditor of an officer in the army to the secretary at war, bona fide and with

a view of obtaining, the interference, the payment debt due; and containing ment of facts, which, thon gatory to the officer's cl the creditor believed to be not a malicious libel, so an action is maintainable. an action, even upon the issue, evidence may be rec shew that the writer believ ed the facts stated in tition to be true. *Fairfax v. E. 3 G. 4.*

LIEN.

1. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being similarly indebted to sold the goods to him. The afterwards became bankrupt on a settlement of account between I. S. and the assignees allowed credit to them at the price of the goods, and he proved the residue of his debt against the estate: Held, the factor had a lien on the price of the goods, such settl of accounts between the factor and the assignees, afforded no answer to an action against the vendee for the price of the goods brought either by or on the behalf of the original owner. *Son v. Granger*, M. 2 G. 4.
2. A foreign merchant, purchased his own name, but on account with the money of B., a merchant, certain bank notes in the French funds. The latter bills upon A., which he accepted on the security of those standing in his name; and the bills were assigned by B., for valuable consideration, to a British subject. Before the bills came due B. authorised A.,

ter, to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived *A.* had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; *B.* also afterwards became bankrupt; *C.*, by process in the foreign country, attached the bank shares still standing in the name of *A.* for the debts due to him upon the bills; and the Court there decreed that the bank shares should be sold, and that the proceeds should be applied, first to pay a debt due from *B.* to *A.*, and afterwards to retire the bills. Under this decree *C.* received a certain sum of money on account of the bills: Held, that the assignees of *A.* could not recover back this money as belonging to *B.* *Cazenove and Another, Assignees of Power and Warwick, Bankrupts, v. Prevost*, M. 2 G. 4.

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3. A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners. Goods having been sent by the carrier, addressed to the order of *I. S.* a mere factor: Held, that the carrier had not, as against the real owner, any lien for the balance due from *I. S. Quere*, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from *I. S. Wright v. Snell*, H. 2 and 3 G. 4.

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LIMITATIONS, STATUTE OF.

1. In an action by an administrator upon a bill of exchange, payable

to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing. *Murray, Administrator v. The East India Company*, M. 2 G. 4.

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2. Where on a plea of *actio non accrevit infra seu annos*, it appeared that a writ of *testatum special capias* was issued, within six years in *Michaelmas* term, and an alias *testatum capias* in *Easter* term following, but no writ in *Hilary* term: Held, that this was sufficient to take the case out of the statute, the suit being actually, although irregularly, commenced within six years, and that the continuances in *Hilary* term might be supplied at any time. *Beardmore v. Rattenbury*, H. 2 and 3 G. 4. 452
3. In order to save the statute of limitations, it is sufficient that the writ be sued out, and the return thereon indorsed upon it in time. It is not necessary that the writ should be delivered out of the sheriff's office as returned. *Tendor and Another, Assignee, v. Hepkins*, H. 2 and 3 G. 4. 489
4. Where premises were mortgaged in fee, with a proviso for re-conveyance, if the principal and interest were paid on a given day, and in the mean time that the mortgagor should continue in possession; upon special verdict it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury, either that interest had or had not been paid by the mortgagor: Held, that upon this finding, it must be taken, that the occupation was by the permission of the mortgagee, and, con-

consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations : Held, also, that an entry is not necessary to avoid a fine levied by the mortgagor. *Hell v. Doe dem. Sureties* (*in error*), E. 3 G. 4. Page 687

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LORDS' ACT.

See PARTNERSHIP, 2.

1. When a defendant is in execution for a particular debt, under 300*L.*, although the aggregate of the debts for which he is in execution exceeds that sum, he is liable, at the instance of the particular creditor, to be brought up under the compulsory clause in the Lord's act, 33 G. 3. c. 5. *Chappell v. Ashley*, H. 2 and 3 G. 4. 537
2. The notices required by 32 G. 2. c. 28. s. 16., need not be personally served on the detaining creditors. Where the service was sworn to be on the attorney of a creditor residing abroad, it was held sufficient, although the affidavit did not state that he was the attorney last employed in the suit under which the insolvent was detained, the objection being taken by the insolvent, and not on the part of the creditor. *Chappell v. Ashley*, E. 3 G. 4. 749
3. A married woman who, with her husband, is in execution for a debt contracted by her before coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney, and complying with the other terms required by the 1 G. 4. c. 119. s. 25. *Ex parte Deacon*, E. 3 G. 4. 759

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NOTICE OF ACTION.

the permission of the mortgagee, and consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations : Held, also, that an entry is not necessary to avoid a fine levied by the mortgagor. *Hall v. Doe dem. Surtees and Another, in error,* E. 3 G. 4. Page 687

NEW TRIAL.

See PRACTICE, 28.

NON-USER.

See COURT, 1.

NOTICE OF ACTION.

By a local act relating to the commissioners of sewers for *Westminster*, it was provided that no plaintiff should recover in any action brought for any thing done in pursuance of the general acts for sewers, or that act, unless notice in writing was given to the defendants, specifying the cause of such action. A notice stated that the defendants, who were contractors under the commissioners, made, altered, &c. certain sewers, &c. running under, through, or adjoining, or near to the plaintiff's house, in so negligent, incautious, unskilful, improvident, and improper a manner, that it fell down ; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five other houses adjoining thereto, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the con-

PARTNERSHIP. 1003

tinuance of the work : Held, that this notice sufficiently described the cause of action : Held also, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up if necessary, as skilful persons would do, and that they were bound, under the above circumstances, to give specific notice to the owner of the house to which the stack of chimneys belonged, of their construction, and of the danger arising therefrom, and that a general notice to him to take proper means to secure his house was not sufficient. *Jones v. Bird, T. 3 G. 4.* Page 83⁷

OUTLAWRY.

See PLEADING, 25.

PACKETS.

See HARBOUR DUES, 1.

PARTNERSHIP.

1. Where an infant held himself out as in partnership with *J. S.*, and continued to act as such till within a short period of his coming of age, but there was no proof of his doing any act as a partner after twenty-one : Held, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one ; and, as he had neglected to do so, that he was responsible to persons who had trusted *J. S.* with goods, subsequently to the infant's attaining twenty-one on the credit of the partnership. *Goode v. Harrison, M. 2 G. 4.* 147
2. By a deed of dissolution of partnership a power was reserved to the remaining partners to use the name

name of the retiring partner in the prosecution of all suits. In an action in which judgment had been obtained by all the partners before the dissolution, it was held that the remaining partners had authority, under that power, to give to the defendant a note for the payment of the six-pences under the Lords' act on behalf of themselves and the retiring partner. *Burton and Others v. Issitt*, M. 2 G. 4.

Page 967

3. By deed, A. and B. covenanted to become partners in the business of army clothiers, for ten years, and that A. should advance 20,000*l.* as part of the capital for carrying on the business, and that B. should find a like sum; that A., during the continuance of the partnership, should have out of the profits, if sufficient, or, if not, out of the capital, 2000*l.* yearly for his share of the profits. B. then covenanted that, on the determination of the partnership by effusion of time, the sum of 20,000*l.* should be repaid to A.; that B. should guarantee all debts and pay all losses. In an action brought upon this deed to recover the 20,000*l.* at the expiration of the ten years, the defendant pleaded, that the deed was executed by way of shift, in pursuance of an usurious agreement. That plea, upon issue joined, was negatived by the verdict of the jury, and judgment was given by the Court of C.P. for the plaintiffs: Held, upon error in H.K. B., that after that finding the deed must be taken to disclose the real intention of the parties, and that it was not, therefore, void upon the ground of usury. *Gilpin v. Enderby*, T. 3 G. 4. 954

PAWNBROKER.

A pawnbroker is a broker within

the 5 G. 2. c. 30. s. 39.; and fore, subject to the bankrupt laws.

A person who had formerly goods upon pledge, b ceased to do so, still con to sell the unredeemed p thereby carries on the trade of pawnbroker, and is subject to bankrupt laws. *Ratlinson v. son*, M. 2 G. 4.

2. A pawnbroker has no right to unredeemed pledges after the expiration of a year from the time the goods were pledged, the original owner tender him the principal and interest due. *Wa Smith*, H. 2 and 3 G. 4.

PENAL ACTION.

1. In order to constitute the offence of keeping a setting dog with 5 and 6 Anne, c. 14. s. 4. th must be kept for the purpose of killing and destroying game; therefore, where it appeared at the time when the alleged offence was charged to have been committed, the dog was tied up and never went out into the house with its master, this was held to be an offence within the statute. *Hayward v. Horne*, 2 and 3 G. 4.
2. J. S., being the master of a workhouse, appointed by receiving orders from the guardians of the poor of the parish, bought provisions from A. B. of such guardians: Held, that was liable to the penalty imposed by the 55 G. 3. c. 13. *West v. Andrews*, H. 2 and 3 G. 4.

PERIL OF THE SEA.

See INSURANCE, 2, 3.

PERJURY.

- See CRIMINAL INFORMATION*
PERPETUITY.

PERPETUITY.

See Devise, 8.

PEW.

See ACTION ON THE CASE, 1.

PILOT.

See SHIP OWNER, 1.

PLEADING.

1. *A., B. and C.*, entered into a bond to the king, the condition of which was, that *A.*, as sub-distributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum, and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage coaches. *A.*, as sub-distributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. A sci. fa. having afterwards issued upon the bond, *B.*, one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same : Held, in an action brought by the surety to recover these sums from the bankrupt, that *A.* was a person "surety for, or liable for, a debt," of the bankrupt, within the meaning of the 49 G. 3. c. 121. s. 8.; and, consequently, that the latter was protected by his certificate : Held, also, that the general plea of bankruptcy was well pleaded. *Westcott v. Hodges*, M. 2 G. 4. Page 12
2. Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c.; and then averred, that plaintiff did assign the bill. It appeared that the parties had agreed that the

plaintiff should give up the bill to the defendant; the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff, by deed, assigned to the defendant the bill, and all sums of money due thereon, to and for the defendant's own use; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill : Held, that the declaration imported that the plaintiff had made an absolute assignment of the bill, and, consequently, that the assignment, in evidence being only conditional, this was a fatal variance. *Vosendau v. Burt*, M. 2 G. 4. Page 42

3. Assumpsit, in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them so accepted to the defendant, in order that he might negotiate the same for his own benefit, defendant undertook to provide money for the payment of the said bills as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof. Breach, that the defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses : Held, upon demurrer, that the plaintiff might be entitled, upon this declaration, to recover special damage, a set-off was not a good plea. *Alnwick v. Netherwood*, M. 2 G. 4. 93
4. Declaration upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiff, in divers large sums of money, for goods sold, and that for securing to

to the plaintiff the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange, drawn by the plaintiff, for and in payment of one of the said several sums of money in which he was so indebted as aforesaid; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums of money in which he so stood indebted as aforesaid. The plea then stated, that defendant had duly become bankrupt, and that the bills of exchange mentioned in the declaration were proveable under the commission; and that the plaintiffs, being creditors for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration: Held, upon demurrer, that this plea could not be supported first, because the proof of a debt under the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt; secondly, that the election of the creditor to take the benefit of the commission is confined by the 40 G. 3. c. 121. s. 14. to the debt actually proved, and does not extend to distinct debts *eiusdem generis* due at the same time. *Harley and Another v. Greenwood*, M. 2 G. 4. Page 95

5. The giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and, therefore, where a ship, having on board a pilot required by law, ran foul of

another vessel, and proceedings were instituted by the owners of the latter, to compel the owners of the former to make good damage, and the former vessel detained until bail was given pending such proceeding agents of the owners of the detained agreed, on the owners of the damaged vessel renounce claims on the other vessel, their proving the amount of damage done, to indemnify and to pay a stipulated sum of damage: Held, that these contradictory decisions as to point, whether ship owners liable for an injury done when ship was under the control of pilot required by law, then sufficient consideration to the promise made by the agents of the owners of the detainer to pay the stipulated sum. *Longridge and Others v. and Another*, M. 2 G. 4. P. 6. Where in an action on a policy of insurance on ship in the usual port for twelve months, at sea port, the loss averred was a loss; that the ship arrived at the harbour of and discharged her cargo came necessary to place her in a graving dock, there to be repaired and near to a certain wharf graving dock; and that while she was there, by the violence of wind and weather, she was over on her side, whereupon struck the ground with great violence, and was bilged, &c. that this was a loss within general words of the policy other perils, losses, and damages, &c., for which the writers were liable: Held that the above facts, with additional circumstance of the ship being two or three feet water

graving dock when the accident happened, did not amount to a loss by perils of the sea. *Phillips v. Barber*, M. 2 G. 4. Page 116

7. The condition of a bond, after reciting that defendant and *J. S.* had delivered and indorsed to the plaintiff a bill of exchange, drawn by *J. S.* and accepted by *A. B.*, was, that defendant and *J. S.*, or either of them, their heirs, &c. should pay or cause to be paid, to the plaintiff, his executors, &c. the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor, to the plaintiff, his executors, &c. according to the tenor of the said bill, together with interest from the time the bill became due: Held, that to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and *J. S.*, or either of them. *Murray v. King*, M. 2 G. 4.

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8. It is not any defence at law to an action on a bond against a surety, that by a parol agreement time has been given to the principal. *Davey and Others, v. Prendergrass*, M. 2 G. 4. 187

9. Assumpsit will lie upon a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognized by statute.

In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing.

An agent having money in his hands belonging to his principal, purchases with it a bill of exchange, which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might therefore sue upon the bill in that character: Held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator, from the time of demand of payment made by the administrator, and not from the time the bills became due.

Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendant's liability, &c.; and the defendant pleaded that the cause of action did not accrue within six years, to which the plaintiff replied generally, that it did accrue within six years: It was held, that the replication was good. *Murray, v. The East India Company*, M. 2 G. 4. Page 204

10. In trespass, the first count of the declaration stated, that the defendant assaulted and imprisoned plaintiff; and, during such imprisonment, struck, pulled, and pushed him about. Justification, that defendant arrested plaintiff under process of court; and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.: Held, that this latter part of the justification not being proved, the plaintiff was entitled to judgment; and that it was not necessary to new assign the battery by the defendant: Held,

- Held, also, the second count of the declaration (which omitted the battery) having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses, as laid in the first count. *Phillips v. Homgate*, M. 2 G. 4. Page 220
11. Where the plaintiffs were creditors and defendants debtors to T. and Co., and, by consent of all parties, an arrangement was made that defendants should pay to plaintiffs the debt due from them to T. and Co.: Held, that as the demand of T. and Co. on defendants was for money had and received, the plaintiffs were entitled to recover, on a count for money had and received, against the defendants. *Wilson v. Coupland*, M. 2 G. 4. 228
12. The condition of a bond, after reciting that A. B. and C. had filed a bill in equity against E. and D., was, that the obligor should pay all such costs as the Court of Chancery should award to the defendants on the hearing of the cause: Held, by three justices (*Abbott* C. J. *dubitante*) that the death of E., before any costs awarded, could not be pleaded in discharge of the bond. *Kipling v. Turner*, M. 2 G. 4. 261
13. In order to constitute the offence of keeping a setting dog, within the 5 and 6 Anne, c. 14. s. 4., the dog must be kept for the purpose of killing and destroying game; and, therefore, where it appeared that, at the time when the alleged offence was charged to have been committed, the dog was tied up, and never went out into the field with its master; this was held not to be an offence within the statute. *Hayward v. Horner*, H. 2 and 3 G. 4. 317
14. *J. S.* being the master workhouse, appointed by receiving orders from the guardians of the poor of the parish, bought provisions from *A. B.* of such guardians: Held, *A. B.* was liable to the sum of 100*l.*, imposed by the 5c. 187. s. 6. *West v. Andrew* 2 G. 4. Pag
15. A printer cannot recover labour or materials used in printing any work, unless he affix his name to it, pursuant to the 99 c. 79. s. 27. *Bensley v. Big H.* 2 and 3 G. 4.
16. An action at common law does not lie for disturbing another in possession of a pew, unless the same be annexed to a house in the parish. *Mainwaring v. Giles* 2 and 3 G. 4.
17. Where judgment of nonsuit has been given in an action brought against an infant, it is no ground of error that the infant had appeared by attorney, *Bird v. I. H.* 2 and 3 G. 4.
18. Declaration stated that defendant covenanted to obey, abide, and perform an award, and he would not prevent the arbitrators from making their award; then stated that the arbitrators made their award, and there directed the defendant to pay a certain sum therein mentioned; alleged as a breach of the covenant, that the defendant did not pay the sum awarded. Plea, before the award, defendant's deed, revoked the authority of the arbitrators, of which revocation they had notice: Held, upon the murmur, that defendant was entitled to judgment, although it appeared by the plea, that he had been guilty of a breach of the covenant to abide by the award by revoking the authority of the arbitrators, the plaintiff being entitled to

cover damages only in respect of the cause of action stated in his declaration, and not in respect of a cause of action disclosed in the plea. The second count of the declaration stated the deed of reference, and then averred that defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this; that the defendant, by a certain deed in writing, signed and sealed by him, after reciting, as is therein recited, did revoke the authority: Held, upon demurrer that this was an allegation, not of the mere legal effect of the deed, but of the fact of revocation, and that it was unnecessary to state that the arbitrators had notice of the revocation, that being necessarily implied in the averment, that the defendant had revoked the authority. *Marsh v. Bullock*, H. 2 and 3 G. 4.

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19. The contractors for making a navigable canal, having with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrongdoer. *Dyson and Another v. Collick*, E. 3 G. 4. 600

20. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person, speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal. *Cartwright v. Wright*, E. 3 G. 4. 615

21. To an action on bill of exchange, the defendant pleaded non-assumption to all but a part, and as to that

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part, a tender. Replication, that after the cause of action accrued, and before the tender, the plaintiff demanded the sum tendered: Held, that this issue would only be supported by proof of the demand of the precise sum tendered. *Atter v. Griffiths*, E. 3 G. 4. Page 630

22. An action lies for the malicious prosecution of a bad indictment for perjury: Held, also, that a count stating that defendant had maliciously indicted plaintiff for wilful and corrupt perjury, is good after verdict, although the count did not set out any indictment. *Pippey v. Hearn*, E. 3 G. 4. 634

23. A petition addressed by a creditor of an officer in the army to the secretary at war, bout side and with a view of obtaining, through his interference, the payment of a debt due; and containing a statement of facts, which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. In such an action, even upon the general issue, evidence may be received to shew that the writer bout side believed the facts stated in the petition to be true. *Fairman v. Fuds*, E. 3 G. 4. 642

24. A count stating that defendant had and received to the use of the plaintiff a certain sum of money, to be paid by the defendant to the plaintiff upon request; and that the non-payment upon request, and that the defendant converted and disposed thereof to his own use, is bad upon demurrer. *Orten v. Butler*, E. 3 G. 4. 652

25. In an original writ the defendant was described as *T. B.* of *G.*, in the county of *N.*, upon a writ of error, brought to reverse the outlawry; the error assigned was, that *T. B.* was not, before *W. M.* the

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- time of the original writ, of or conversant in *C.* aforesaid, and that there was not any town, hamlet, or place of the name of *C.* in that county. Plea to this assignment of errors, that plaintiff prosecuted his writ with intent to declare upon a bond made by the defendant, by which he was described as *T. B.* of *C.* in the county of *N.*: Held, that this was an estoppel. *Bonner v. Wilkinson*, *E. 3 G. 4.* Page 682
26. *A.* covenanted that he would, from time to time, at the request of *B.*, avow and confirm all actions that *B.* should bring in respect of a bond, of which *A.* was the obligee, without releasing the same. Declaration stated, that *B.* commenced an action in the name of *A.*, against the obligor of the bond, and that *A.* did not, although often requested so to do, avow and justify the said action, but, on the contrary thereof, executed a release to the obligor of all actions, bonds, &c., by reason whereof the plaintiff was hindered from recovering the principal and interest, his costs, and other expenses: Upon special demurrer to this breach, it was held, first, that the averment of request was unnecessary, and that it therefore required no venue, inasmuch as it appeared that the defendant had, by executing the release, disabled himself from bringing any action upon the bond. Secondly, that it was no ground of demurrer to the whole breach, that the plaintiff was not entitled to recover the special damage. *Amory v. Broderick*, *E. 3 G. 4.* 712
27. Debt on a bond given to plaintiff, as treasurer of a friendly society. Plea, that the rules of the society had not been confirmed at the quarter sessions, pursuant to *33 G. 3. c. 54.* : Held, upon demurrer, that

- the plea was bad, the bond good at common law. *Woollam, E. 3 G. 4.*
28. A plaintiff paid into his bankers a cheque of 250*l.* drawn by a third person, who received without any objection in the course of the day the drawer of the cheque a sum of money, part of which was particularly appropriated, a balance unappropriated. The bankers, who were the trustees of the drawers to the amount, wrote on the next day to the plaintiff stating the cheque was not paid, and they would keep it in trust of there being money to pay it. and on that day a further appropriated balance was making altogether a sum equaling the plaintiff's cheque. That under these circumstances the plaintiff might maintain an action had and received against the drawers, and that the latter, being agents for receipt of the money, could not appropriate the same to the payment either of the general account against the drawers or of two cheques presented on the same day, but subsequently that of the plaintiff, and them. *Kilsby v. Willis and Others*, *3 G. 4.*
29. Declaration for tithes demanded and sold. Plea, that before exhibiting of the plaintiff to the defendant paid to the plaintiff a sum of money, parcel, &c., in discharge and satisfaction of the tithes in the declaration mentioned, and that plaintiff accepted the same in satisfaction and charge of the promises. Plea, that before the execution of the bill, the plaintiff had given out a latitudinarian, and that the plaintiff did not, before the

sued out that writ, pay the plaintiff the said sum of money in manner and form as the defendant had alleged. Upon demurral, it was held that the plea was bad, because it did not allege the payment to have been in discharge of the costs and damages accrued by reason of the non-performance of the promises. *Francis v. Crywell, T. 3 G. 4.* Page 886

PLEDGE.

A. and *B.* having agreed to purchase cottons on their joint account, directed their brokers to purchase the same. These purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession as the brokers of *A.* Immediately after the purchase, *B.* paid *A.* one half of the value. After considerable purchases had been made, the brokers were informed that *B.* had an interest in the goods purchased; *A.* after this, directed the brokers to procure him a loan on the security of the warrants, and *C.* advanced money by discounting bills drawn by *A.* upon the brokers, as a security for which, the whole of the warrants were deposited with *C.* by the brokers. While they were so deposited, the brokers received directions both from *A.* and *B.* to make a division of the goods held on their joint account, which they did by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by *A.* to get one half renewed, which *C.* agreed to do, and discounted fresh bills, and the brokers then left in the hands of *C.*, as a security for the

money thus advanced, the warrants belonging to *B.*; *C.*, however, not then knowing that *B.* had any interest in them:

Held, first, that the first pledge did not transfer to *C.* any interest in that part of the goods which belonged to *B.* Semble, that a sale by one of two tenants in common of the whole property, is a conversion as to the share of one, and consequently that trover is maintainable:

Held, secondly, that after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and that being so, the second pledge was a pledge of a specific chattel belonging to *B.* which the brokers had no authority to make, and that trover was maintainable. *Barton v. Williams, H. 2 and 3 G. 4.* Page 395

POOR.

- I.* *S.* being the master of the workhouse, appointed by, and receiving orders from, the guardians of the poor of the parish of *W.*, bought provisions from *A.* *B.* one of such guardians: Held, that *A.* *B.* was liable to the penalty of 100*l.* imposed by the 55 G. 3. c. 137. s. 6. *West v. Andrews, H. 2 and 3 G. 4.*

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POOR RATE.

Where the owner of the soil, by indenture, granted to certain adventurers full and free liberty to dig, mine, and search for tin, tin ore, &c., and the same to take and convert to their own use, subject to a reservation therein contained, and to make such adits, shafts, &c. as they should think necessary, yielding and paying to him one full eighth share of all such tin, tin ore, &c., the same having been

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first spalled, picked, or otherwise made merchantable, and fit to be smelted. And the indenture contained a power either for payment in ore, or the amount thereof in money, which had been acted upon; and the owner had received it in money: Held, that for this, his one-eighth share, he was liable to be rated as an occupier of land, the reservation operating as an exception out of the demise, and not being of the nature of a rent. *Rex v. The Inhabitants of St. Austell*, E. 3 G. 4. Page 693

POWER OF APPOINTMENT.

Certain lands were conveyed to *A. B.*, his heirs and assigns, to such uses as *C. D.* should by deed appoint; and in default of, and until appointment, to the use of *C. D.* in fee. *C. D.* afterwards, in execution of the power, by deed duly made an appointment of the said estates in favour of *E. F.* in fee. *C. D.* at the time of making the appointment, was married. His wife was held not to be doable out of these lands. *Ray v. Pung*, E. 3 G. 4. 561

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT, 2.

Where a power of attorney was given to fifteen persons, jointly or severally therein named, to execute such policies as they or any of them should jointly or severally think proper: Held, that an execution of such power by four of the persons named was sufficient. *Guthrie v. Armstrong*, E. 3 G. 4. 628

POWER OF LEASING.

See LEASE, 2.

PRACTICE.

See NOTICE OF ACTION

1. A submission to arbitration 9 and 10 W. 3. c. 15. s. 1., made a rule of court in this nation. *In the Matter of Tagg*, 2 G. 4.
2. Where a plaintiff in error comes out of the jurisdiction of the court, he may be compelled to give security for costs; and in case thereof, the defendant is will be permitted to proceed with his judgment notwithstanding the writ of error. *Lewis and Ovens*, M. 2 G. 4.
3. A tipstaff is entitled to take of 6s. and no more, for conveying a prisoner from the Judge's chambers to the King's Bench. *Matter of Salisbury*, M. 2 G. 4.
4. Where on a plea of actus non propositus, it appeared that a writ of process or capias was issued within six years in Michaelmas term, alias testatum capias in term following, but no writ in Hilary term: Held, that it is sufficient to take the case out of the statute, the suit being a although irregularly, commenced within six years, and that the continuance in Hilary term might be supplied at any time. *Bea v. Rattenbury*, H. 2 and 3 G. 4.
5. In order to save the statute of limitations, it is sufficient that the writ be sued out, and the same thereon indorsed upon it is delivered. It is not necessary that the writ should be delivered out of the sheriff's office as returned. *v. Hopkins*, H. 2 and 3 G. 4.
6. Where, in the account between

- plaintiff and defendant, there are items clearly due on both sides, it is an arrest without reasonable and probable cause within 43 G. 3. c. 46. s. 3., if the plaintiff arrests and holds the defendant to bail for the amount due to him without, at the same time, giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance. *Dronefield v. Archer*, H. 2 and 3 G. 4. Page 513
7. Where a rule has been obtained for staying the proceedings in ejection till the costs of a former ejection have been paid, the Court will not interfere, and permit the defendant in case those costs are not paid before a certain day to be named by the Court, to non pros the ejection pending. *Doe dem. Sutton v. Ridgway*, H. 2 and 3 G. 4. 523
8. Where, in a case in which a corporation were defendants, the record is withdrawn in consequence of the absence of a material witness who is one of the corporation, and it does not appear that such absence arises from the act of, or is in collusion with the other corporators, the prosecutor will be compelled to pay the costs of not proceeding to trial pursuant to notice. *Rex v. The Mayor, &c. of Great Yarmouth*, H. 2 and 3 G. 4. 531
9. Where an attorney, knowing that bail are insufficient, puts them in, and gives notice of justification, he will be personally liable to pay the costs of the opposition. *Blundell v. Blundell*, H. 2 and 3 G. 4. 533
10. A certificate to deprive a plaintiff of costs, may be indorsed on the postea after costs have been taxed, and although the defendant's attorney was present, and did not object to such taxation. *Foxall v. Banks*, H. 2 and 3 G. 4. Page 536
11. When a defendant is in execution for a particular debt under 300*l.*, although the aggregate of the debts for which he is in execution exceeds that sum, he is liable at the instance of the particular creditor to be brought up under the compulsory clause in the lords' act, 33 G. 3. c. 5. *Chappell v. Ashley*, H. 2 and 3 G. 4. 537
12. A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown: Held, that he could not, within 22 G. 2. c. 46. s. 8 & 10., be considered as serving his whole time and term in the proper business of an attorney, and that he ought not to be admitted on the roll, and that having been admitted, he ought to be struck off. *Ex parte Taylor, Gent. one, &c.* H. 2 and 3 G. 4. 538
13. In trespass the Court will, upon a proper case being made for it, require the plaintiff's attorney to give to the defendants information as to the place of abode and occupation of the plaintiff. And where the alleged assault was stated to have taken place, at a meeting at which many thousand people were present, and the defendants did not know, and could not find out, after diligent enquiry, who the plaintiff was, the Court thought it a proper case for their requiring such information to be given. *Johnson v. Birley*, H. 2 and 3 G. 4. 540
14. Where the facts tending to criminate a magistrate, took place twelve months before the application to the Court, they refused to grant a criminal information, although the prosecutor, in order

defendant out of custody, on the ground that she was a married woman, it is necessary that that fact should be positively stated in the affidavit. And, therefore, where it was sworn that she was a married woman, as by certificate annexed will appear, it was held insufficient. *Harvey v. Cooke, E. 3 G. 4.*

Page 747

24. Where a plea is so framed as that it may reasonably induce the plaintiff to consult counsel in order to know how to deal with it, the Court will, on affidavit that such a plea is wholly false, permit the plaintiff to sign judgment as for want of a plea. *Shadwell v. Berthoud, E. 3 G. 4.* 750

25. It is not a valid objection on shewing cause, that a rule to compute was moved on the day of signing interlocutory judgment for not bringing in the record. *Russen v. Hayward, E. 3 G. 4.* 752

26. A married woman, who, with her husband, is in execution for a debt contracted by her before coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney, and complying with the other terms required by the 1 G. 4. c. 119. s. 25. *Ex parte Deacon, E. 3 G. 4.* 759

27. In trespass against custom-house officers for taking plaintiff's goods, which had been returned in a deteriorated state before action brought, a verdict was found for plaintiff, for the difference in price between the value of the goods at the time of the seizure, and the time when they were returned. The judge certified that there was probable cause for the seizure: Held, that the plaintiff was not precluded by the 28 G. 3. c. 37. s. 24. from taking out execution for the damages found by the

jury. *Laugher v. Brefitt, E. 3 G. 4.* Page 762

28. Where a new trial is ordered, the costs to abide the event, such event means the ultimate event of the cause, and therefore, if the verdict on the second trial be set aside, and on a third trial, the ultimate event is the same as at the first trial, the party will be entitled to the costs of the first trial. *Meule v. Goddard, E. 3 G. 4.* 766

29. A tenancy by virtue of an agreement in writing for three months certain, is a tenancy "for a term" within the meaning of the 1 G. 4. c. 87.

Upon a rule, calling upon the tenant to enter into a recognizance under that statute, it is unnecessary to express in the rule nisi the amount of the security required. *Doe dem. Phillips v. Roe, E. 3 G. 4.* 766

30. An information in the nature of a quo warranto may be granted at common law, within the 9 Anne, c. 20., against a party for exercising the office of a bailiff in the borough of M. although it was not a corporate office. Quære, whether in such a case the defendant may plead several matters. *Rex v. Highmore, E. 3 G. 4.* 771

31. The 17 G. 3. c. 56. s. 22. takes away the writ of certiorari only from offences for the first time, created by 22 G. 2. c. 27. and does not apply to those created by 12 G. 1. c. 34., and extended to the silk and cotton trades by 22 G. 2. c. 27. *Rex v. Rogers, E. 3 G. 4.* 773

32. A judge's certificate under 43 Eliz. c. 6. is sufficient to deprive a plaintiff of costs, notwithstanding the action be brought under 11 G. 2. c. 19. s. 19., by which, in case the plaintiff obtains a verdict, he is entitled

- tituled to full costs. *Irvine v. Reddish*, T. 3 G. 4. Page 796
33. The 19 G. 3. c. 70. s. 4. is confined to those suits in inferior courts where the proceedings are similar to those in the superior courts, and, therefore, does not extend to the case of a foreign attachment. *Bulmer v. Marshall*, T. 3 G. 4. 821
34. Where a bailiff had written to an attorney for writs, which the latter sent without knowing any thing of the parties or circumstances, but the bailiff never represented himself or had been considered as an attorney, nor looked for any profit upon the law proceedings: Held, that this was not a case within the 22 G. 2. c. 46. s. 11.: but that it was a most improper practice, which the Court, in virtue of its general jurisdiction over attorneys, would punish severely. *Ex parte Whatton*, T. 5 G. 4. 824
35. A bond was conditioned for the resignation of a living, which the defendant, when requested, had refused to resign: Held, that he being a wrong doer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest, nor in estimating the annual proceeds to deduct the curate's stipend. *Lord Sondes v. Fletcher*, T. 3 G. 4. 835
36. A bill against an attorney was filed at Michaelmas term, and appeared by the memorandum to have been filed on the 28th of November: Held, that evidence was admissible to shew that it was actually filed on the 24th December: Held, also, that a demand and refusal is evidence of a prior conversion; and, therefore, where deeds were in defendant's possession prior to Michaelmas term, and the de-
- maud and refusal prove the day after that term, that this was evidence version before the term. *Girdlestone*, T. 3 G. 4.
37. The notice to the tenant at the foot of the action in ejectment, need not contain the name of the plaintiff; the name of the lessor of the tenant, or even any other person. The Court will permit the judgment against the cause to be drawn up. *Good Duke of Norfolk v. No* 3 G. 4.
38. Where a surety in a way of attorney, in order to disentitle himself from his personal liability paid part of the debt due to a creditor of a bankrupt, and proved under the commission thereupon satisfaction was put on the record: Held, that this did not fall within the 49 G. 3 s. 8. as being a payment of a debt in discharge of the surety, and that consequently the bankrupt's certificate was no bar to action by the surety to recover money so paid by him. *S. Soutten*, T. 3 G. 4.
39. In debt for use and occupation after judgment by default, that a writ of enquiry is necessary before signing final judgment. *Arden v. Connell*, T. 3 G. 4.
40. Where a plaintiff had issued a writ against three defendants for separate causes of action, and, after delivering three separate summonses de bene esse, entered common appearance according to the statute for all the three defendants, and signed three interlocutory judgments as for want of trial. Held, that this was irregular. *v. Bucknell*, T. 3 G. 4.
41. Where a plaintiff had been sued at nisi prius on the

- of a trifling variance between the contract set out, and that proved, the Court granted a new trial with leave to amend the declaration, generally on payment of costs, with liberty to the defendant to plead de novo or demur. *Williams v. Pratt*, T. 3 G. 4. Page 896
42. Charges for holding the courts leet of a manor by the steward, are charges for business connected with his professional character of an attorney; and, therefore, are like conveyancing charges, taxable when found in a bill containing other taxable items. *Luxmore, Gent., one, &c. v. Lethbridge, one, &c.* T. 3 G. 4. 898
43. The Court will not grant a mandamus to a private trading corporation to permit a transfer of stock to be made in their books. *Rex v. The London Assurance Company*, T. 3 G. 4. 899
44. Where a lord of a manor is indicted for a nuisance in not repairing the bank of a river, the Court will not compell him to allow the prosecutor, even though he is a tenant of the manor, to inspect the court rolls for the purpose of obtaining evidence in support of the prosecution. *Rex v. The Earl of Cadogan*, T. 3 G. 4. 902
45. No motion can be made to stay the proceedings in an action on a judgment pending a writ of error until bail have been put in and perfected. *Abraham v. Pugh*, T. 3 G. 4. 903
46. Where a plaintiff, shortly previous to making an affidavit of debt, had written a letter, stating that the defendant was a creditor of his, the Court interfered in a summary way to discharge the defendant out of custody, on affidavits denying the debt, the plaintiff not having denied the writing of such letter by him, or alleged that the debt due to him had arisen subsequently to it. *Nizetich v. Bonacich*, T. 3 G. 4. Page 904
47. Where a defendant, being previously in custody in execution for a debt, a detainer was lodged against him, but for too large a sum, and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer: Held, that this second detainer was regular, and that it was not like the case of a fresh arrest; which cannot be made till the costs have been paid. *White v. Gomperz*, T. 3 G. 4. 905
48. Where a cause stood in the paper below the last cause mentioned in the written list affixed at the outside of the court, and was tried, (being stated to be an undefended cause,) the counsel for the defendant objecting to it; and declining to appear: Held, that the trial was regular, and the Court refused a new trial, there being no affidavit of merits. *Blackhurst v. Bulmer*, T. 3 G. 4. 907
49. Where a plaintiff carried on business abroad, and had no permanent residence in England, but was in England at the time of bringing the action, and it was sworn, had no intention of leaving the country: Held, that this was no sufficient answer to an application for security for costs, inasmuch as it was not distinctly sworn that he resided and intended to continue to reside here: Held, also, that it is no answer to such application, that the action is brought in pursuance of liberty reserved by the Vice-Chancellor, it not being brought by his direction. *Oliva v. Johnson*, T. 3 G. 4. 908

PRINCIPAL AND AGENT.

1. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale: the factor being also similarly indebted to *I. S.*, sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between *I. S.* and the assignees, *I. S.* allowed credit to them for the price of the goods, and proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3. sess. 2. c. 28. s. 29., "All contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by *A.*, sold the same, and entered the contract in his book as having been made for *C.*, the master of the ship. It was not signed by the purchaser; but in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted: the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. Query, whether, under the circumstances, an action might be brought in the name of *C.* for the

- price of the coals. *H. Granger, M. 2 G. 4.*
2. A power of attorney at an agent to demand, sue cover, and receive, by ^{ways and means whatso} monies, debts, dues, &c. and to give sufficient di does not authorize him to bills for his principal. Having money in his hand^{ing} to his principal, purch^{ing} it a bill of exchange, w^h indorses specially to his pi^t the latter, at the time of dorsement, was dead, but i^t was not known to the agent that the property in the bill to the administrator of t^h principal, and that he might, th^e sue upon the bill in that ch^{ase} *Murray v. The East India Company, M. 2 G. 4.*
3. *A.* and *B.* having agreed to chase cottons on their joint account, directed their brokers to purchase the same. The chases having been made, v^{er} or orders for delivery were put out in the name of the brokers, and the cottons were left in their possession as the brokers' property. Immediately after the purchases were made, *A.* paid *A.* one half the value. Considerable purchases had been made, the brokers were in debt to *B.* for the goods purchased; *A.*, after directing the brokers to give him a loan on the security of their warrants, and *C.* advanced the sum by discounting bills drawn upon the brokers, as a security for which the whole of the money was deposited with *C.* the brokers. While they were so deposited, the brokers received directions, both from *A.* and *B.*, to make a division of the goods on their joint account, whi^c

PRINTER.

did by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by *A.* to get one-half renewed; which *C.* agreed to do, and discounted fresh bills, and the brokers then left in the hands of *C.*, as a security for the money thus advanced, the warrants belonging to *B.*; *C.*, however, not then knowing that *B.* had any interest in them: Held, first, that the first pledge did not transfer to *C.* any interest in that part of the goods which belonged to *B.* Semble that a sale by one of two tenants in common of the whole property is a conversion as to the share of one, and, consequently, that trover is maintainable: Held, secondly, that after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and that being so, the second pledge was the pledge of a specific chattel belonging to *B.*, which the brokers had no authority to make; and that trover was maintainable. *Barton v. Williams*, *H. 2 G. 4.* Page 395

4. *A.*, a merchant in *London*, had been in the habit of selling goods to *B.*, resident in the country, and of delivering them to a wharfinger in *London*, to be forwarded to *B.* by the first ship. In pursuance of a parol order from *B.* goods were delivered to and accepted by the wharfinger, to be forwarded in the usual manner: Held, that this not being an acceptance by the buyer, was not sufficient to take the case out of the 29 *Car. 2. o. 9. s. 17.* *Hanson v. Armitage*, *H. 2 and 3 G. 4.* 557

PRINTER.

See PLEADING, 15.

RESIGNATION BOND. 1019

PROMOTIONS, 438.

QUO WARRANTO.

See PRACTICE, 8.

1. Where, in an application for a quo warranto against a constable, the affidavits in support of the rule stated, that for fifty years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial: Held, that it was not sufficient. *Rex v. Lane*, *H. 2 and 3 G. 4.* Page 488
2. An information in the notice of a quo warranto may be granted at common law, within the 9 *Anne*, c. 20, against a party, for exercising the office of a bailiff in the borough of *M.*, although it was not a corporate office. Quere, whether in such a case, the defendant may plead several matters. *Rex v. Highmore*, *E. 3 G. 4.* 771

RATE.

See INCLOSURE ACT, 2. *JUSTICES*, 3.

RECOGNIZANCE.

See PRACTICE, 19.

REGISTER ACT.

See DEED, 1.

RENT.

See POOR RATE, 1. *LANDLORD AND TENANT*, 11.

RESIGNATION BOND.

See ADVOWSON.

RELEASE.

RELEASE.

A deed, containing a general release of all debts, &c., recited that the releasee had previously agreed to pay to the releasor the sum of 40*l.*, for the possession of certain premises, and that, "in consideration of the said sum of 40*l.* being now so paid as hereinbefore is mentioned," and also in consideration of the sum of 10*s.* a-piece, well and truly paid to the said releasor and J. S., the receipt of which said several sums of money they did thereby acknowledge, release, &c. There was also a receipt for the sum of 40*l.* indorsed on the release. But it appeared on an action afterwards brought for this sum, that in fact it had never been paid: Held, that this deed of release was no estoppel, inasmuch as the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the sum of 40*l.* *Lampon v. Corke*, E. 3 G. 4. Page 606

REMOVAL, ORDER OF.

1. An order of removal was dated 1st *August*, 1814, and an order of suspension indorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and indorsement was, in 1814, served upon the appellants, but the original order not produced at the time of serving such copy; and subsequently, in 1815, another part of the order and indorsement executed by the same justices, but bearing date in *August*, 1814, was served upon the appellants. The pauper was not removed till 1819, when an appeal was duly entered: Held, that the

services of the original order of removal in 1814 and 1815 were defective, and that the appeal made in time, notwithstanding 49 G. 3. c. 124. s. 2. *Rex v. The habitants of Alnwick*, M. 2 G. 4.

2. Where an order of removal has been executed, and by consequence the removing parish and magistrates making it, it is superfluous and the paupers taken back in the discretion of the session enter an appeal against it according as they may think justice requires it, in order to compel the respondents to pay the costs of maintenance, &c. incurred by the appellants before the order was superseded. *Rex v. The habitants of Norfolk*, H. 2 and 3 G. 4.

SEA.

The public have no common right of bathing in the sea; incident thereto of crossing sea-shore on foot, or with boats or machines for that purpose. *dell v. Catterall*, M. 2 G. 4.

SETTLEMENT.

1. A pauper, being eighteen years of age, and residing with his father, was drawn as a militia man, and served for five years as a ball man. During his service, he deserted several times, when on furlough, and, finally, after his discharge from the militia, returned to his father's house: Held, that he so remaining separated from his father's family after twenty-one years, he was emancipated, although the original separation was not voluntary on his part. *Rex v. The habitants of Hardwick*, M. 2 G. 4.

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2. During the minority of a child, there can be no emancipation unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as wholly and permanently to exclude the parental controul. Semble, that the acquiring a settlement of his own does not properly constitute an emancipation. *Rex v. The Inhabitants of Wilmington*, H. 2 and 3 G. 4. Page 525
3. Where the unemancipated daughter of an *Irishman*, not having acquired any settlement of his own in *England*, became pregnant, being unmarried, and as such was actually chargeable under 35 G. 3. c. 101. s. 6.: Held, that this did not make her father and the rest of his family removable by a pass to *Ireland* under 59 G. 3. c. 12. s. 33.; but that the daughter might be removed by an order to the place of her birth in *England*. *Rex v. The Inhabitants of Whitchaven*, E. 3 G. 4. 720
4. Where a district, previously extra-parochial, was, by act of parliament, made a township, and it was provided that from thenceforth it should maintain its own poor, and repair its own roads, and have the like powers, privileges, and immunities, and be subject to the same regulations, as other townships within the county: Held, that this clause was prospective only, and that a bastard born within the district previously to passing the act, was not settled there. *Rex v. The Inhabitants of Oakmere*, E. 3 G. 4. 775

SETTLEMENT BY APPRENTICESHIP.

1. An indenture of apprenticeship, executed before the passing of the 44 G. 3. c. 98:, must be stamped with the premium stamp within the

time prescribed by the statute 8 Anne, c. 9., and where such an indenture was stamped at the time of its being produced in evidence, with the stamp required by the 55 G. 3. c. 184., but not within the time prescribed by the statute of Anne: Held, that the indenture was wholly void, and that the pauper, by serving under it, gained no settlement. *Rex v. The Inhabitants of Chipping Norton*, H. 2 and 3 G. 4.

Page 412

2. Where a parish apprentice was assigned by his original master to I. S., by an instrument in writing, but there was no consent of two magistrates: Held, that this was not a lawful assignment, under 32 G. 3. c. 57. s. 7., but it was sufficient to shew the consent of the first master to the service to I. S., and consequently, such service was good as a service under the original indenture, and conferred a settlement. *Rex v. The Inhabitants of Barlestow*, E. 3 G. 4.

780

SET-OFF.

Assumpsit in consideration that the plaintiff, for the accommodation, and at the request of the defendant, would accept certain bills of exchange, and would deliver them, so accepted to the defendant, in order that he might negotiate the same for his own benefit, defendant undertook to provide money for the payment of the said bills, as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof. Breach, that defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of

of the bills certain sums of money, with interest, charges and expences: Held, upon demurrer, that, as plaintiff might be entitled upon this declaration to recover special damage, a set-off was not a good plea. *Hardcastle v. Netherwood*, M. G. 4. Page 93

SEWERS, COMMISSIONERS OF.

By a local act relating to the commissioners of sewers for Westminster, it was provided that no plaintiff should recover in any action brought for any thing done in pursuance of the general acts for sewers, or that act, unless notice in writing was given to the defendants, specifying the cause of such action. A notice stated that the defendants, who were contractors under the commissioners, made, altered, &c. certain sewers, &c. running under, through, or adjoining, or near to the plaintiff's house, in so negligent, incautious, unskilful, improvident, and improper a manner, that it fell down; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five other houses adjoining thereon, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the continuance of the work: Held, that this notice sufficiently described the cause of action: Held, also, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such

proper precautions for them, and to shore them necessary, as skilful persons do, and that they were under the above circumstances to give specific notice to the owner of the house to which the chimneys belonged, of the construction, and of the danger therefrom, and that a gentle notice to him to take proper steps to secure his house was sufficient. *Jones v. Bird*, T. P. 1770.

SHERIFF.

1. The growing crops of a farm having been seized under a writ of hab. fac. poss. were subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a lease made long before the issue of the writ: Held, that the sheriff was not bound to sell the growth under the writ, inasmuch as he could not, in point of law, consider as belonging to the farm the latter being a trespass on the day of demise laid in the declaration: Held, also, that the sheriff had no right to allow the landlord a year's rent, under the statute of 8 Ann. c. 14. that contemplated an existing tenancy, which, in this case, must be deemed to have ceased on the day of demise in the ejectment. *Holland and Others, Assignees of Sir Gascoigne*, M. 2 G. 4.
2. A sheriff has no right under the law to seize fixtures, where the same are situated in the freehold of the person whom the execution issues. *v. Ingilby*, E. 3 G. 4.

SHIP.

1. A transfer of a ship, while

to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom-house officers in that port within a reasonable time after the sale. *Richardson and Others, Assignees of Wyler and Another v. Campbell, M. 2 G. 4.* - Page 196

2. The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity ; and, therefore, where, in the course of a voyage from *India*, the ship was wrecked off the *Cape of Good Hope*, and some indigo, which was part of the cargo, was saved, and the same was there sold by public auction, by the authority of the captain, acting bona fide according to the best of his judgment for the benefit of all persons concerned ; but the jury found that there was no absolute necessity for the sale : Held, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, the original owners were held entitled to recover its value. *Freeman v. The East India Company, E. 3 G. 4.* 617
3. A., a ship-builder, contracted with B. to build a ship for B., and complete her in *April, 1819*. The latter was to pay for her by four instalments ; the first when the keel was laid, the second when they were at the light plank, and the third and fourth when the ship was launched. Before the 25th *June, 1819*, the ship was measured, with the builder's privity, to the intent that B. might get her registered in his name. On the 25th the ship-builder signed the usual certificate of her building, and on the 26th the ship was registered in B.'s name, and on that day the third instalment was paid. On the 30th *June A.* committed an act of bank-

ruptcy, upon which a commission afterwards issued. On the 2d of *July*, the ship not being then completed or launched, B. and a crew hired by him took possession of the ship and a rudder and cordage, the former of which was made by the ship-builder; and the latter bought by him for the express purpose of completing the ship : Held, first, that the legal effect of the ship-builder's having signed the certificate to enable B. to have the ship registered in his name, was to vest the general ownership in B. from the time the registry was completed : Held, secondly, that as the rudder and cordage were made and bought by the ship-builder specifically for the ship, they were to be considered as parts of the ship ; and that the property in them also vested in B. : Held, thirdly, that although the general property in the ship was vested in B., yet, as A. had not parted with the possession, and as he would have had a lien upon the ship for the amount of the fourth instalment, if he had completed it ; that the taking possession of the ship by B., without tendering the amount of the fourth instalment, or so much thereof as was due, provided any thing was due, was wrongful, and, consequently, that the assignees of A. were entitled to recover from B. the amount of the fourth instalment, provided the expense necessary for the completion of the ship did not amount to that sum, or so much thereof as would remain due after defraying such expense. *Woods and Another, Assignees of Paton, a Bankrupt v. Russell, T. 3 G. 4.* Page 942

SHIP OWNER.

The giving up of a suit instituted to try

try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and, therefore, where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter, to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages: Held, that, there being contradictory decisions as to the point whether ship owners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. *Longridge and Others v. Dorville*, M. 2 G. 4.

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SMUGGLER.

A smuggler may be a trader within 1 Jac. 1. c. 15. s. 2. as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. A penalty due to the crown is a debt within 21 Jac. 1. c. 19. s. 2., and, therefore, where a trader lay in prison above two months, being unable to pay exchequer penalties for smuggling: Held, that it was an act of bankruptcy. *Cobb, Assignee of Monsey*,

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v. *Symmonds*, H. 2 and P

SPIRITUOUS LIQUOR

A plaintiff, in an action for a bill, is not entitled to recover any items under 20s. for supplied to the guests, such being prohibited by 24 G. s. 16. *Burneyat v. Hut M. 2 G. 4.*

STAMP.

1. An indenture of apprenticeship executed before the passing of 44 G. 3. c. 98. must be stamped with the premium stamp within the time prescribed by the 8 Anne, c. 9., and where an indenture was stamped at the time of its being produced in court with the stamp required by 55 G. 3. c. 184. but not within the time prescribed by the 8 Anne: Held, that the indenture was wholly void, and the master pauper, by serving under it, no settlement. *Rex v. Habitants of Chipping Norton*, 2 and 3 G. 4.

2. Three persons joined as acceptor, and first indorsees, making an accommodation, and it was afterwards issued in value to J. S. Previously being so issued, its date being altered: Held, that the bill, having assented to the alteration when he was informed of it, no answer to an action can be given against him, that the bill has been so altered without the consent of the drawer and first indorsees, that a fresh stamp was necessary in consequence of such alteration, the bill having been issued before it was issued in value. *Downes v. Richard*, 3 G. 4.

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SURETY.

STATUTE, CONSTRUCTION OF.

See APOTHECARIES.

STOPPAGE IN TRANSITU.

See VENDOR AND VENDEE, 8.

SURETY.

See BANKRUPT, 11.

1. *A. B. and C.* entered into a bond to the king, the condition of which was ; that *A.*, as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum ; and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage-coaches. *A.*, as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt and obtains his certificate. A sci. fa. having afterwards issued upon the bond ; *B.*, one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same : Held, in an action brought by the surety to recover these sums from the bankrupt that *A.* was a person "surety for, or liable for, a debt" of the bankrupt within the meaning of the 49 G. S. c. 121. s. 8., and consequently, that the latter was protected by his certificate : Held, also, that the general plea of bankruptcy was well pleaded. *Westcott v. Hedges*, M. 2 G. 4. Page 12

2. It is not any defence at law to an action on a bond against a surety, that by a parol agreement, time has been given to the principal. *Davey and Others v. Pren-dergrass*, M. 2 G. 4. 187

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SURNAME.

See FORFEITURE, 1.

TENANT IN COMMON.

*See LANDLORD AND TENANT, 10.
PRINCIPAL AND AGENT, 3.*

TIPSTAFF.

See PRACTICE, 9.

TITHE.

1. *A.* having purchased an estate free from rectorial tithe, with a right of common thereto annexed ; the common was afterwards inclosed under an act of parliament, and certain land was allotted to *A.* in lieu of his said right of common : Held, that no tithe was payable in respect of the allotted land. *Steele v. Manns*, M. 2 G. 4. Page 22
2. By an inclosure act it was enacted, that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed unto the impropriate rectors and curate, in lieu of all great and vicarial tithes ; and the commissioners were required to distinguish by their award, the several allotments to the impropriate rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes : Held; under this act, that the tithes were not extinguished until the commissioners made their award. *Ellis v. Arison*, M. 2 G. 4. 47

TONNAGE DUTY.

See HARBOUR DUES, 1.

TOWNSHIP.

See CONSTABLE, 1.

3 X TRES.

TRESPASS.

See PRACTICE, 28.

The contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrong doer. *Dyson v. Collick, E. 3 G. 4.*

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TROVER.

See PRINCIPAL AND AGENT, 3.

1. Where goods, the property of the plaintiff, had been, by the servant of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them, refused to do so without an order from the company : Held, that this was not such a refusal as amounted to a conversion of the goods by the defendant. *Alexander v. Southey, M. 2 G. 4.* 247
2. Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill ; and it was afterwards seized under a fi. fa. by the sheriff and sold by him : Held, that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery even during the continuance of the term. *Farrant v. Thompson, T. 3 G. 4.* 826
3. A bill against an attorney was filed of Michaelmas term, and appeared by the memorandum to

have been filed on the 2nd of November : Held, that evidence admissible to shew that the action was actually filed on the 24th of November : Held, also, that a refusal to accept a sum of money and refusal is evidence of conversion, and therefore the deeds were in defendant's possession prior to Michaelmas and the demand and refusal were on the day after the term, it was held that evidence of a conversion before the term. *Wilton v. Grindal, T. 3 G. 4.* 1

UNDER-SHERIFF

See EVIDENCE, 5.

USE AND OCCUPATION

See PRACTICE, 39.

USURY.

See PARTNERSHIP, 1.

An inclosure act empowers commissioners to make a defray the expences of and executing the act ; and it is held, that persons advancing money should be repaid out of the money raised by the commissioners. Expences were incurred in the execution of the act before the rate was made. To defray these expences the commissioners drafts upon their bankers, requiring them to pay the sums mentioned on account of the public drainage, and to place the same to their account as commissioners. The bankers, during a period of six years, continued to pay considerable sums by paying drafts : Held, that the commissioners were personally responsible for the payment of the same.

VARIANCE.

to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging interest half-yearly was not unlawful on the ground of usury. *Eaton v. Bell*, M. 2 G. 4. Page 34

VARIANCE.

1. Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c.; and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant the bill, and all sums of money due thereon, to and for the defendant's own use; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: Held, that the declaration imported that the plaintiff had made an absolute assignment of the bill, and consequently, that the assignment in evidence being only conditional, this was a fatal variance. *Vansandau v. Burt*. M. 2 G. 4.

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2. Where a libellous paragraph as proved contained two references, by which it appeared to be in fact the language of a third person speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references: Held, that these omissions altered the sense of the remainder, and

VENDOR AND VENDEE. 1027

that the variance was fatal. *Cartwright Esq. v. Wright*, E. 3 G. 4. Page 615

VENDOR AND VENDEE.

1. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale: the factor being also similarly indebted to J. S., sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between J. S. and the assignees, J. S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3. sess. 2. c. 28. s. 29., "all contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by

A., sold the same, and entered the contract in his book as having been made for C., the master of the ship. It was not signed by the purchaser; but in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted; the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. Quere, whether, under the

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cir.

circumstances, an action might be brought in the name of *C.* for the price of the coals. *Hudson v. Granger*, M. 2 G. 4. Page 27

2. *A.*, a spirit merchant, sold to *B.*

a wine merchant, several casks of brandy, some of which at the time of the sale were in *A.*'s own vaults, and others in the vaults of a regular warehouse keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that this sale had taken place; but no notice of such sale had been given to the warehouse keeper with whom some of the casks were deposited. *A.*, having become bankrupt while the brandies remained where they were originally deposited, it was held that the whole of them passed to his assignees, as goods in his possession, order and disposition by the consent and permission of the true owner, within the 21 Jac. 1. c. 19. s. 11. *Knowles v. Horsfall*, M. 2 G. 4. 134

3. A transfer of a ship, while at sea,

to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom-house officers in that port, within a reasonable time after the sale.

Richardson v. Campbell, M. 2 G. 4. 196

4. Where an advertisement for the sale of a ship, described her as "a copper-fastened vessel," adding, that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened: Held,

that notwithstanding t "with all faults, &c." was liable for the breach of warranty. *Shepherd v. 2 G. 4.*

5. By a public act, the Bridge Company were to raise money for the purpose of completing their undertaking among themselves by the admission of new members, granting annuities for term or for life. The act did not contain any provision that the annuities should, or should be redeemable. The Company, however, in the original grant, to themselves a power of alienation: Held, under these circumstances, that an auctioneer putting up to sale one of these annuities was bound in his particular to describe it as a redeemable annuity. *Coverley v. Burton*, 2 G. 4.

6. *A.*, a merchant in London, kept in the habit of selling goods to a resident in the country, and delivering them to a wharf in London, to be forwarded to the first ship. In pursuance of a parol order from *B.*, goods were delivered to, and accepted by the wharfinger to be forwarded in the usual manner: Held, that being an acceptance by the wharfinger, it was not sufficient to take the goods out of the 29 Car. 2. c. 1. *Hanson v. Armitage*, H. 1 G. 4.

7. The captain of a ship has authority to sell the cargo, in cases of absolute necessity; therefore, where, in the course of a voyage from India, the ship was wrecked off the Cape of Good Hope; and some indigo was part of the cargo, which was sold at a public auction, by the authority of the captain, acting bona fide, in the interest of the ship and crew: Held, that the sale was valid.

cording to the best of his judgment for the benefit of all persons concerned; but, the jury found that there was no absolute necessity for the sale; Held, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, the original owners were held entitled to recover its value. *Freeman v. The East India Company*, E. 3 G. 4.

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8. Where goods were sold, free on board, and upon their shipment the agent of the vendors tendered to the mate, (the captain being absent) a receipt by which the goods were acknowledged to be shipped on account of the vendors, which the mate kept, but refused to sign, and on the following day signed bills of lading to the orders of the vendees: Held, that the transitus was not an end, but that on the insolvency of the vendees, the vendors were entitled to stop the goods. *Ruck v. Hatfield*, E. 3 G. 4. 632

9. The vendor of a print, being a copy in part of another, by varying in some trifling respects from the main design, is liable to an action by the proprietor of the original; and that although the vendor did not know it to be a copy. *West v. Francis*, E. 3 G. 4. 737

10. A horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendors for 20 days without any charge to the vendee. At the expiration of that time the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors: Held, that there was no acceptance of the horse by the vendee within 29 Car. 2. c. 3. s. 17. *Carter v. Toussaint*, T. 3 G. 4.

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WAREHOUSE KEEPER.

See VENDOR AND VENDEE, 2.

WARRANT.

A warrant issued in pursuance of a writ de contumace capiendo stated that the defendant was attached for non-payment of costs in a cause of appeal and complaint of nullity lately depending in the Arches Court of Canterbury: Held, that this warrant was insufficient in not stating with certainty the nature of the cause, so as to shew that it was one apparently within the jurisdiction of the Ecclesiastical Court. *Rex v. Dugger*, E. 3 G. 4.

Page 791

WAY.

1. In trespass and justification under a public right of way, the locus in quo, which was not a thoroughfare, had been under lease from 1719 to 1818, but as far back as living memory could go, it had been used by the public, and lighted, paved, and watched under an act of parliament, in which it was enumerated as one of the streets in Westminster. After 1818, the plaintiff, who previously lived for 24 years in its neighbourhood, inclosed it: Held, that under these circumstances, the jury were well justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for 99 years, nor by any one, except the owner of the fee. Quære, whether there can be a public highway which is not a thoroughfare. *Wood v. Yeal*, H. 2 and 3 G. 4. 454
2. By lease granted in 1814, and to take effect in June, 1820, certain houses, together with a piece of ground which was part of an adjoining yard, were leased to a tenant,

tenant, together with all ways with the said premises, or any part thereof, used or enjoyed before the time of granting the lease, the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain right of way to every part of that yard: Held, that the leasee was entitled to such right of way to the part of the yard demised to him.
Kooystra v. Lucas, T. 3 G. 4.

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WILL.

1. A testator having both real and personal estate, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, whatsoever and wheresoever, to trustees, their executors, administrators, and assigns, upon trust; that they should, out of such residue of the monies and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession for the remainder of his term therein, for the joint advantage of certain of his sons and daughters therein named; and, at the expiration of the said term, upon further trust, to sell and dispose of such residue of his estate and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters: Held, that the testator's real estate did not pass by this will. *Doe dem. Hurrell and Another v. Hurrell and Others, M. 2 G. 4.* 18
2. A testator, by his will, bequeathed the rents of one dwelling-house situate in *A.* to *C.B.* for his life; and from and after the decease of the said *C.B.*, he bequeathed the same rents, together with the rents of all his other houses and lands, unto his nephews and nieces therein mentioned, for their lives and the

life of the survivor; and a decease of the survivor he gave and devised all his and lands to trustees, in sell the same, and to produce of such sale unto the children of his nephew niece as should be living time of the decease of survivor; and then devised all residue of his estate to *C.B.* that upon the death of tator, the nephews and nieces an immediate estate, for the and the life of the survivor rent of all the houses and except the house specific queathed to *C.B.* for *I.*
Doe dem. v. Annandale v. M. 2 G. 4.

3. An estate in fee, upon the mination of a life estate, vised to the wife of *A.B.* was one of the attesting w to the will. The testator 1779, and the wife of *A.B.* 1819, before the previous lit was determined: Held, th was not a good attesting wi this will. *Hatfield v. Th* 3 G. 4.
4. *A.*, at the time of making was seized in fee of certa hold and leasehold premis amongst the rest, of a d house, which he inhabited, parish of *D.*; and six acres situate in the parish of *S.*, distant from the village and seventy acres of leaseho in and near the village of fifty-eight acres of freehol and some leasehold land parish of *W.* *A.*, at the of making his will, resided dwelling-house, and had in occupation all the land parish of *W.A.*, and the f lands in the parish of *S.*, an hold lands near the village but the freehold lands in th

WILL.

of *D.* were in the occupation of tenants. Before the making of the will *A.* had contracted to sell all the lands in the parish of *S.*, and the leaseholds near the village of *B.* The amount of *A.*'s debts at the time of his death exceeded his personal property. *A.*, shortly before his death, made a will as follows: "I direct my debts, legacies, and funeral expenses to be paid; with the due payment whereof I charge my real estates. I give to my nephew, *T. G.*, 700*l.*, to be paid by my executor; and to my nephew, *J. G.* (the heir at law) 20*l.*, to be paid by my executor; and, lastly, I constitute *R. G.* my sole executor of all my lands for ever, and all my leasehold property here or at *B.*, or money that

WRIT OF ERROR. 1091

shall become due for the same, paying certain annuities thereout by half-yearly payments." Held, that by this will the executors took a fee in the freehold lands in the parish of *W.* *Doe dem. Gillard v. Gillard, E. 3 G. 4.* Page 785

WITNESS.

See Evidence, 7. WILL, 3.

WRIT DE CONTUMACE CAPI-ENDO.

See WARRANT, 1.

WRIT OF ERROR.

See PRACTICE, 2.

END OF THE FIFTH VOLUME.

